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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,
*Petitioners,*

v.

LOCKHEED CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does a disclosure statement which fails to provide a complete and accurate description and evaluation of lawsuits which are the debtors' largest assets and defenses to the debtors' largest claims, and fails to state directly the primary choice presented to the creditors, satisfy the "adequate information" standard of 11 U.S.C. § 1125?

2. Does a bankruptcy court have the statutory and constitutional power to enter a final, dispositive order of dismissal, and make fact findings, concerning lawsuits involving breach of contract and fraud claims, as part of "proceedings in respect to confirmation of plans"?

3. Do Bankruptcy Rule 9003, DR 7-110(B) of the Code of Professional Responsibility, and Canon 3A(4) of the Code of Judicial Conduct, prohibit repeated and extended *ex parte* discussions between the bankruptcy judge and counsel for the winning party in a contested matter, where counsel and the judge prepare and discuss four amended versions of written findings of fact and conclusions of law?

## LIST OF PARTIES

The parties to the proceedings below were:

*Petitioners*

Texas Extrusion Corporation

Pickens Industries, Inc. (holder of 100% of stock of Texas Extrusion Corporation)

Richard W. Pickens and Louise R. Pickens, husband and wife (owners of 80% of stock of Pickens Industries, Inc.)

*Affiliates*

Texas B&P Machine Co., Inc.

Texas Extrusion Presses, Inc.

*Respondent*

Lockheed Corporation

*Affiliate*

Lockheed Finance Corp.

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v.

LOCKHEED CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Texas Extrusion Corporation, Pickens Industries, Inc., Richard W. Pickens and Louise R. Pickens respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 12, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 844 F.2d 1142, and is reprinted in the appendix hereto, p. 1a *infra*.

The memorandum decision of the United States District Court for the Northern District of Texas (Porter, D.J.) is reported at 68 B.R. 712.

## JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1471, petitioner Texas Extrusion Corp. ("Texas Extrusion") brought suit against respondent Lockheed Corp. and its subsidiary Lockheed Finance Corp. (collectively "Lockheed") in the Bankruptcy Court for the Northern District of Texas, Dallas Division ("the corporate suit"). Later, invoking federal jurisdiction under 28 U.S.C. § 1332, petitioners Richard W. Pickens and Louise R. Pickens ("Pickens" or "the Pickens") brought suit against Lockheed in the Northern District of Texas, Dallas Division ("the individual suit"). Petitions for relief under Chapter 11 of the Bankruptcy Act were filed for all four petitioners in the Bankruptcy Court for the Northern District of Texas.

Following entry by the Bankruptcy Court of an order confirming a plan of reorganization, petitioners perfected their appeals to the District Court pursuant to 28 U.S.C. § 1334. The District Court affirmed, and petitioners perfected their appeal to the Fifth Circuit, pursuant to 28 U.S.C. § 1291. Certain final orders, including an order of dismissal of the individual suit, entered by the District Court in connection with the plan of reorganization, were

appealed directly to the Fifth Circuit pursuant to 28 U.S.C. § 1291.

On petitioners' appeals, the Fifth Circuit on May 12, 1988, rendered its judgment and opinion affirming the Bankruptcy Court. Thereafter, petitioners timely filed a petition for rehearing, which was denied on June 7, 1988.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutes involved in this petition are 11 U.S.C. § 1125, the Emergency Interim Rule (Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings),[1] Art. III § 1 of the United States Constitution, and Bankruptcy Rule 9003. Each of these statutes is reprinted in the appendix hereto.

## STATEMENT OF THE CASE

The controversy which is at the heart of this appeal is based upon dealings between petitioners Richard Pickens and Texas Extrusion with respondent Lockheed Corporation beginning in late 1978. At that time, Lockheed approached Pickens, and asked that Texas Extrusion expand its aluminum extrusion plant, and convert it to the manufacture of hard alloy aluminum extrusions, because Lockheed was in desperate need of a reliable source of such extrusions for its L-1011 airplane program. Despite Pickens' initial reluctance, Lockheed ultimately convinced Pickens and Texas Extrusion to borrow $5.5

1. Since the relevant portion of the Emergency Interim Rule is in substance identical to 28 U.S.C. § 157(b)(2)(L), an interpretation of the interim rule is also equivalent to an interpretation of the current statute. This statute is also reprinted in the appendix.

million from Lockheed Finance to expand and refurbish the Texas Extrusion facilities, and enter into a 10-year supply contract, based upon written projections of $27 million in profits for Texas Extrusion over the life of the contract. The money was lent, the facilities were expanded, and Texas Extrusion began performing under the supply contract, with Lockheed purchasing virtually all its production, but Lockheed shortly thereafter breached the contract, forcing petitioners into financial difficulties.

During 1981, while Texas Extrusion was in severe financial difficulties due to Lockheed's breach of the supply contract, and was being pressured by Lockheed Finance for payment, Lockheed, through various means of control over the petitioners, forced the execution of an amended supply contract which contained within it a clause purporting to release Lockheed from liability under the original contract. Despite promises of additional business which induced the execution of the 1981 amendment, Lockheed shortly thereafter cancelled the L-1011 program, and breached its obligations under the second contract. When Lockheed again began pressuring petitioners to pay the debt which had been incurred in expanding the plant for Lockheed's benefit, and threatening seizure of the plant and liquidation, Texas Extrusion and its holding company filed petitions for relief under Chapter 11 of the Bankruptcy Act in March 1982. Lockheed was the largest secured creditor in these proceedings.

Immediately after the Chapter 11 proceedings were initiated, the corporate suit was filed as an adversary proceeding against Lockheed and Lockheed Finance for breach of the supply contract, and fraud, seeking $40

million in actual damages, and $80 million in punitive damages. Because of jurisdictional objections raised by Lockheed based upon the decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, (1982) (hereafter *"Marathon"*), the case was promptly thereafter transferred to the District Court for the Northern District of Texas, where the case remained until shortly before the hearing on the plan of reorganization.

Because of claims asserted by Lockheed against the Pickens as guarantors, Richard W. Pickens and Louise R. Pickens each filed petitions for relief under Chapter 11 of the bankruptcy laws in February and November 1983, respectively. In November 1983, the Pickens filed the individual suit against Lockheed, seeking recovery of $15.5 million in damages suffered individually as guarantors arising from Lockheed's breach of contract and fraud.

Beginning in late 1983, Lockheed, along with the unsecured creditors committee of Texas Extrusion, proposed a plan of reorganization which had as its essential feature dismissal of the two lawsuits against Lockheed, and sale of all of the debtors' (petitioners') assets. The petitioners vigorously opposed the plan of reorganization. They retained present counsel of record shortly before the beginning of the confirmation hearing, who immediately sought to have the corporate suit transferred back to the district court, asserting the bankruptcy court's lack of constitutional jurisdiction, and opposed Lockheeds' motion to refer the individual lawsuit to the bankruptcy court on the same grounds. The confirmation hearing began in February 1984 and continued over four days of testimony. Prior to the conclusion of the hearing, petitioners filed a notice of non-consent advising the bank-

ruptcy court that, based upon *Marathon,* they did not consent to his entering a final, dispositive order concerning their lawsuits.

Immediately following the conclusion of the testimony on March 3, 1984, the bankruptcy judge announced his decision to confirm the plan of reorganization, and made lengthy verbal findings of fact not only concerning the plan, but also relating to the underlying factual disputes in both the corporate lawsuit and the individual lawsuit.

Soon after the hearing was concluded, counsel for Lockheed began submitting written findings of fact and conclusions of law to the bankruptcy court, without serving copies on petitioners' counsel. The written findings, and order confirming plan, were signed March 20, 1984.

At the hearing on petitioners' motion to amend findings of fact, it was disclosed that there had been repeated and extensive discussions between counsel for Lockheed and the bankruptcy judge in which four separate versions of the written findings of fact were prepared and discussed. Respondent readily acknowledged that counsel for petitioners was not advised of these communications.

Petitioners duly perfected their appeal from the order confirming plan to the district court, which did not rule until December 30, 1986, at which time the bankruptcy court's orders were affirmed. Although all parties requested oral argument, there was no oral argument granted, and, despite petitioners' constitutional objections, no opportunity was given for *de novo* consideration of evidence. Appeal was then perfected to the Fifth Circuit.

Certain ancillary final orders in connection with the plan of reorganization were appealed directly to the Fifth

Circuit, which were abated, and consolidated with the main appeal from the order confirming plan of reorganization. The Fifth Circuit, in the consolidated proceedings, affirmed the bankruptcy court's order confirming the plan of reorganization. Petitioners' motion for rehearing was denied, and petitioners have duly presented this petition for certiorari to this Honorable Court.

Since Lockheed, the bankruptcy trustee for Texas Extrusion, and the creditors' committee, have stipulated that if the plan is reversed, no attempt will be made to require creditors to repay the dividends they have received, and the creditors will have no further participation, Lockheed is the only party that will be adversely affected by reversal of the courts below.

## REASONS FOR GRANTING THE WRIT

### I. The Fifth Circuit's Decision Emasculates The "Adequate Information" Requirement of 11 U.S.C. § 1125, Which is Pivotal to the Disclosure Concept of the Bankruptcy Code

#### A. The "Adequate Information" Standard is Critical to the Bankruptcy Code

The purpose of § 1125 of the United States Bankruptcy Code (11 U.S.C.A. § 1125(a)(1)) is to ensure that creditors voting on a plan of reorganization have "adequate information" to enable them to make an intelligent and informed decision as to whether to accept or reject it. The legislative history to § 1125 emphasized that the key to the statute is the disclosure section, which is based upon the premise of allowing creditors to make an "informed decision". H. R. Rep. No. 595, 95th Cong., 1st Sess. 226 (1977).

Thus, the Bankruptcy Code contemplates that the creditors, not the judge as under the old act, will have the information which will enable them to make an informed decision as to whether or not they will vote for a plan of reorganization. *See* 5 *Collier on Bankruptcy* ¶ 1125.03 (15th ed. 1984).[2] The legislative history concluded that, due to the fundamental changes in the handling of reorganization cases under the Bankruptcy Code, the hearing on the disclosure statement "will be one of, if not the major, procedural hearing in a reorganization case." U.S. Code Cong. & Ad. News, 95th Cong., 2nd Sess., 1978, p. 6186. As the legislative history also indicates, the disclosure statement hearing was to be one of the essential safeguards crucial to the new Bankruptcy Code, in that it would make the judge a "fairer arbiter", and not an advocate of the plan, which in the past "had led to a suspicion of bias on the part of many dealing with the bankruptcy court". *Id.* at 6187-6188.

### B. The Disclosure Statement Here Failed to State Clearly the Primary Issue to be Decided and to Give an Evaluation of the Suits Against Lockheed and Defenses to its Claims

At the confirmation hearing, the Bankruptcy Judge correctly noted that "the guts of the thing . . . is what [the corporate lawsuit] is worth". (Confirmation Hearing

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2. The attitude of the Bankruptcy Judge below was pre-Code. At the hearing on the Disclosure Statement, he stated, with respect to litigation, that "there's no use of giving a bunch of information. Just like when you have a settlement in a lawsuit, there's no use in really giving information about that settlement to the creditors. They don't know whether it's a good settlement or not. They haven't been involved in a court hearing and *it's a kind of a silly requirement of the Code to have to do that . . .*" (Hearing on the Disclosure Statement at 65.) (Emphasis added.)

Transcript, hereafter "Conf. Hear." at 913). All parties agreed by their statements and actions.

It would have been simple to place the following legend at the beginning of the disclosure statement so that creditors would have been advised of the central issue to be decided:

> THE CENTRAL ISSUE TO BE DECIDED IN WHETHER TO ACCEPT OR REJECT THE PLAN IS WHETHER OR NOT THE LITIGATION AGAINST LOCKHEED SHOULD BE DISMISSED BECAUSE YOU BELIEVE THAT THE ULTIMATE VALUE TO BE RECOVERED FROM THAT LITIGATION IS LESS THAN THE BENEFIT THAT YOU WILL RECEIVE FROM THIS PLAN OF REORGANIZATION, TAKING INTO CONSIDERATION THE RISKS OF LITIGATION.

Such a conspicuous statement would have allowed a hypothetical reasonable creditor to focus upon the same issue which was the focus of the confirmation hearing. *Nowhere* in the Disclosure Statement is this statement or any similar statement made. After precisely this argument was made by counsel for petitioners (Conf. Hear. at 268-269), the Bankruptcy Court stated, "[W]ell, I admit they didn't emphasize that." (Conf. Hear. at 269). Indeed, the Fifth Circuit in its opinion here frankly acknowledged "that *the importance of the valuation and settlement of the various lawsuits* between appellants and Lockheed to the plan *was not emphasized in the disclosure statement*", and that the creditors were not told the importance of the settlement of the lawsuits to the plan "in so many words". 844 F.2d at 1157, App. at 27a. (Emphasis added).

Likewise, the attorney for the Creditors' Committee had to admit that nowhere in the Disclosure Statement is there any analysis of the value of the lawsuit (Conf. Hear. at 927-928), and the chairman of the committee admitted that a person cannot tell the value of the lawsuit by reading the Disclosure Statement (*Id.* at 281-282).

Most courts have required some *valuation* of a debtor's key assets in disclosure statements so that creditors could make an informed judgment. *In re Feldman,* 53 B.R. 355, 358-359 (Bkr. S.D. N.Y. 1985); *In re East Redley Corp.,* 16 B.R. 429, 430 (Bkr. E.D. Pa. 1982); *In re Ligon,* 50 B.R. 127, 130 (Bkr. M.D. Tenn. 1985); *In re Metrocraft Publishing Services, Inc.,* 39 B.R. 567, 569-571 (Bkr. N.D. Ga. 1984); *In re A.C. Williams Co.,* 25 B.R. 173, 176 (Bkr. N.D. Ohio 1982); *In re New Haven Radio, Inc.,* 18 B.R. 977, 980 (Bkr. D. Conn. 1982); *In re Werth,* 29 B.R. 220, 223-224 (Bkr. D. Colo. 1983). The Fifth Circuit decision in this case is the first circuit court decision construing § 1125 of which petitioners are aware, and it is contrary to this established weight of authority.

By analogy, the type and extent of disclosure which should now be made to the creditors should parallel the considerations which this Court required the judge, under the old act, to make, in *Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968). In *Protective Committee,* this Court stated that the bankruptcy judge should

> [apprise] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting

> on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

*Id.* at 424-425; *see also, id.* at 434. This Court further noted that in the absence of complete disclosure to creditors, "it is scarcely surprising that creditors failed to come forward with objections to the compromises." *Id.* at 435. Under the new disclosure concept envisioned by the Bankruptcy Code, these factors should have been explained to the creditors in the disclosure statement.

Courts interpreting § 1125(a)(1) have quite understandably held that litigation by the debtor against creditors is of primary importance in a disclosure statement. Thus, the court in *In re Malek,* 35 B.R. 443 (Bankr. E.D. Mich. 1983), held that litigation issues

> are to be described in an objective and professional tone, free of any mischaracterizations of the issues to be resolved in such litigation. Where possible, the [proponent] should provide an evaluation of the probable success of any litigation and its effects on the Debtor's business or his plans for reorganization under Chapter 11. . . . *All pending or contemplated litigation of whatever nature must be described fully, completely, and in detail.* Trial dates, where known, must be disclosed. Appeals, filed or contemplated, must be disclosed. *The disclosure statement must include a professional evaluation of the probable success of any pending or contemplated litigation.*

*Id.* at 444 (emphasis added); *accord, In re Cyr Bros. Meat Packing, Inc.,* 2 B.R. 620, 625 (Bkr. D. Maine 1980).

Here, rather than fully describing Lockheed's obligations to purchase from Texas Extrusion, and the projections of over $27 million in profits for Texas Extrusion which were being exceeded when Lockheed first breached the contract, the Disclosure Statement simply describes the loans by Lockheed Finance to Texas Extrusion and the subsequent default on those loans. The Disclosure Statement omits any mention of Lockheed's necessary part in insuring Texas Extrusion's inability to repay the Lockheed Finance loans, although its central role in TEC's financial crisis is confirmed not only by Pickens' testimony (Conf. Hear. at 988-989), but also by Lockheed's own internal memoranda (Conf. Hear. Ex. Vol. III, Debtors' Exhibit 9), and by the Bankruptcy Judge's verbal findings. (App. 96a-102a).

The Disclosure Statement only briefly mentions the Texas Extrusion lawsuit against Lockheed and Lockheed Finance. This description is limited to half a paragraph on page 7. (App. 124a). It states that an "adversary proceeding against Lockheed Corporation and LFC seeks $40 million in actual damages and $80 million in punitive damages. Texas Extrusion alleged that Lockheed induced Texas Extrusion to enter into the original Supply Contract by falsely overstating its production requirements. . . ."

In addition to the brief reference to the lawsuits on page 7 of the Lockheed Disclosure Statement, there is a section entitled "Lawsuits and Release" on page 27. (App. 141a). This describes the requirement of the Plan that Lockheed have releases from all four debtors, and includes a paragraph explaining that "[i]t is possible that if Texas Extrusion obtained a judgment against Lockheed in the Texas Extrusion Lawsuit, the unsecured creditors of Texas Extrusion could be paid in full. The

amount of that judgment, however, would have to exceed the entire claim of Lockheed (approximately $7,983,-065.83 plus daily accruals of interest) before any sums would be available for the administrative, tax and unsecured claims in the Texas Extrusion Case."

This manner of describing the lawsuits gives a typical reasonable investor the impression that the lawsuit is relatively insignificant in deciding whether to vote for or against the Plan. It is further misleading because it assumes the validity of the Lockheed claim, and fails to disclose and evaluate the debtors' defenses, including equitable subordination and lendor control. Section 510(c) of the Bankruptcy Code, (11 U.S.C.A. § 510(c) (West 1979)), codified existing law permitting a bankruptcy court to subordinate the claims of creditors under the principles of equitable subordination, to the extent necessary to offset injury to other creditors. *Beniamin v. Diamond,* 563 F.2d 692, 698-701 (5th Cir. 1977).

A court may equitably subordinate a secured claim *even if* it finds the claim to be valid and *even if* a judgment had been previously entered on the claim, as long as the court determines that the creditor has engaged in the requisite inequitable conduct. *See Pepper v. Litton,* 308 U.S. 295, 305-306 (1939) (claim reduced to judgment held subject to equitable subordination). When a claim to be subordinated is secured by a lien, § 510(c)(2) allows the lien to be transferred to the debtor's estate pursuant to 11 U.S.C.A. § 541(a)(4) (West 1979). *See e.g. Zoltanski v. Brown,* 33 B.R. 219 (Bkr. N.D. Ohio 1983) (recovered property becomes property of debtor's estate).

Since equitable subordination can so radically change the ordinary bankruptcy priorities, courts have recognized

that information regarding the possibility of its application is of major significance to a creditor deciding whether to vote to confirm a plan. In *Cyr Bros.*, 2 B.R. at 627, the district court noted that the creditors could not possibly evaluate the merits of the plan without being aware that their unsecured debts might receive a higher priority if certain secured claims were subordinated. *Id. See also Protective Committee,* 390 U.S. at 428 (Court disapproved plan of reorganization because, *inter alia,* facts regarding possible subordination of debts were not in record); *In re Civitella,* 15 B.R. 206, 207 (Bkr. E.D. Pa. 1981) (creditors cannot make independent evaluation of plan if disclosure statement does not contain adequate information regarding classification of debts).

Lockheed was an insider of Texas Extrusion, and as such it had a fiduciary duty to Texas Extrusion which enhances the likelihood of equitable subordination. *See* 11 U.S.C.A. § 101(25); *Wilson v. Huffman,* 712 F.2d 206, 210 (5th Cir. 1983). The evidence at the hearing was that Lockheed determined the debtor's line of business, products and product mix, demanded to be the sole purchaser of its products, and then, after Lockheed breached its contract and precipitated the debtor's serious financial problems, Lockheed's personnel moved in and told Texas Extrusion how to manage its business, and exactly where and how to sell its products. (Conf. Hear. at 999-1002 and Conf. Hear. Ex. Vol. IV, Debtors' Ex. 16, pp. 6-12). These facts closely parallel those in *In re American Lumber Co.,* 7 B.R. 519, 529 (Bkr. D. Minn. 1979).

The facts in this case have an uncanny resemblance to the facts in *Gannett Co. v. Larry,* 221 F.2d 269 (2d Cir. 1955). There, Gannett, wanting to assure a continuous supply of newsprint, financed Berwin, a small

paper manufacturing plant, as its emergency source of newsprint. After Gannett lent a substantial amount of money to Berwin for its expansion, the anticipated shortage never materialized and Gannett failed to purchase sufficient products to enable Berwin to stay in business. When Gannett filed its claims in Berwin's subsequent bankruptcy, the Second Circuit equitably subordinated Gannett's claims and held that "[i]t would be unfair to allow the claim of Gannett on a parity with other creditors who lacked the interest which Gannett had in Berwin's disastrous experiment in the newsprint field." *Id.* at 275.

### C. Review is Essential to Provide Proper Guidance to the Bankruptcy Courts in Applying the "Adequate Information" Standard

The Fifth Circuit decision in this case will disrupt the lower courts' principled interpretation of § 1125 by its holding that determination of what is "adequate information" is "subjective". 844 F.2d at 1157, App. at 27a. Virtually all of the reported decisions by lower courts list *objective* standards and criteria to be followed. *See* pp. 10-12 *supra*.

Critically, however, the Fifth Circuit's holding that valuation of *the most important assets* of the debtors was unnecessary is bad law, providing poor construction of § 1125. Unless this erroneous construction of § 1125 is quickly corrected, bankruptcy courts will be encouraged to circumvent the key to the whole reorganization statute by omitting evaluations of significant assets. Since circuit court review of bankruptcy matters is often prevented by financial limitations and time pressures, this Court should not defer ruling on this crucial point until a conflict develops between circuits.

## II. This Case Should be Reviewed Not Only Because the Fifth Circuit Decision Conflicts With This Court's Decision in *Marathon*, But Also Because the Lower Courts Desperately Need Guidance in Construing *Marathon*

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court held that to the extent that the Bankruptcy Reform Act granted jurisdiction of "all civil proceedings arising under Title 11", it was unconstitutional, giving Congress over three months to remedy the situation (*id.* at 88), later extending this until December 25, 1982.[3] Congress did not act within the time period prescribed and the Supreme Court refused to grant a further stay of the judgment.[4] Thereafter, the Judicial Conference of the United States proposed an "Emergency Rule" which was adopted as the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings on December 21, 1982. (App. 151a).

The Fifth Circuit, in *In re Braniff Airways*, 700 F.2d 214 (5th Cir.), *cert. denied*, 461 U.S. 944 (1983), has upheld the Emergency Rule, as have other circuits.[5]

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3. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982).

4. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 459 U.S. 1094 (1982).

5. *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 928 (1983); *In re Davis*, 730 F.2d 176 (5th Cir. 1984); *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983); *In re Hansen*, 702 F.2d 728 (8th Cir.), *cert. denied*, 463 U.S. 1208 (1983); *Oklahoma Health Serv. Fed. Credit Union v. Webb*, 726 F.2d 624 (10th Cir. 1984).

This Court's decision in this case, determining whether the bankruptcy court constitutionally exercised jurisdiction over petitioners' state law based contract claims, will provide critical guidance to the lower courts in distinguishing between "core" and "non-core" proceedings. Indeed, as the successor to the Bankruptcy Judge below has written,

> [T]he post-*Marathon* era has developed into *one of the most confusing periods in the history of federal jurisprudence*. The explosive proliferation of lower court opinions following *Marathon* and the Bankruptcy Amendments and Federal Judgeship Act of 1984 . . . attests to the degree of uncertainty and resulting inconsistency among lawyers and judges.

*In re Satelco, Inc.*, 58 B.R. 781, 782 (Bkr. N.D.Tex. 1986) (Emphasis added).

In enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 which included 28 U.S.C. § 157, Congress' apparent intent was to codify the Emergency Bankruptcy Rule. *See In re Bokum Resources, Corp.*, 49 B.R. 854, 864 (Bkr. D. New Mexico 1985), citing 130 Cong. Rec. H1846, H1487. The Emergency Interim Rule and 28 U.S.C. § 157 are virtually identical in structure and in their analysis of the distinction between so-called "core" and "non-core" cases.[6]

Ever since the passage of 28 U.S.C. § 157, there has been widespread confusion and difference of opinion among the lower courts in construing the statute. As

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6. While the terminology varies somewhat as between the interim rule and the statute, both attempt to distinguish between types of disputes over which the bankruptcy court has jurisdiction to enter final orders (so-called "core" proceedings), and those cases which, absent consent, must be tried by an Article III court (so-called "related" or "non-core" proceedings).

explained in *In re Counts,* 54 B.R. 730, 734 (Bkr. D. Colo. 1985), and *In re Satelco, Inc.,* 58 B.R. at 783, some courts, believing that the statute cures the constitutional defects found in *Marathon,* construe it broadly to include all types of proceedings which come within the literal meaning of Section 157(b)(2).[7] Other courts, taking the view that the statute does not cure the constitutional defects explained in *Marathon,* hold that the term "core proceeding" must be interpreted narrowly, using the *Marathon* decision as a guideline.[8]

The expansive reading of 28 U.S.C. § 157 opens the door for an unconstitutional application of the statute, as succinctly explained by the court in *In re Republic*

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7. Cases in which the expansive view is enunciated include *In re Arnold Print Works, Inc.,* 815 F.2d 165 (1st Cir. 1987); *In re Lion Capital Group,* 46 B.R. 850 (Bkr. S.D.N.Y. 1985); *In re Lombard-Wall, Inc.,* 46 B.R. 365 (S.D.N.Y. 1985); *Macon Prestressed Concrete Co. v. Duke,* 46 B.R. 727 (D. Ga. 1985); and *In re Marketing Resources Intern Corp.,* 43 B.R. 71 (Bkr. E.D. Pa. 1984). *In re All American of Ashburn, Inc.,* 49 B.R. 926 (Bkr. N.S. Ga. 1985); *In re Delorean Motor Company,* 49 B.R. 900 (Bkr. E.D. Mich. 1985); *In re Shell Materials, Inc.,* 13 B.C.D. 185 (Bkr. M.D. Fla. 1985); *In re Franklin Computer Corporation,* 50 B.R. 620 (Bkr. E.D. Pa. 1985); *In re Harry C. Partridge, Jr. & Sons, Inc.,* 48 B.R. 1006 (S.D.N.Y. 1985); *In re Ram Construction Company, Inc.,* 49 B.R. 363 (W.D. Pa. 1985); *In re Bucyrus Grain Company, Inc.,* 56 B.R. 204 (Bkr. D. Ks. 1986).

8. Cases following this restrictive analysis include *In re Pierce,* 44 B.R. 601 (D. Colo. 1984); *In re Bokum Resources Corp., supra; In re Illinois-California Express, Inc.,* 50 B.R. 232 (Bkr. D. Colo. 1985); *Mohawk Industries v. Robinson Industries,* 46 B.R. 464 (D. Mass. 1985); *In re Atlas Automation, Inc.,* 42 B.R. 246 (Bkr. E.D. Mich. 1984); *In re Morse Electric Co., Inc.,* 47 B.R. 234 (Bkr. N.D. Ind. 1985); *In re Alexander,* 49 B.R. 733 (Bkr. D. N.D. 1985); *In re Nanodata Computer Corporation,* 52 B.R. 334 (Bkr. W.D. N.Y. 1985), *aff'd,* 74 B.R. 766 (W.D. N.Y. 1987); *In re Zweygardt,* 52 B.R. 229 (Bkr. D. Colo. 1985); *In re Yagow,* 53 B.R. 737 (Bkr. D. N.D. 1985); *In re Crabtree,* 55 B.R. 130 (Bkr. E.D. Tenn. 1985); *In re Smith-Douglass, Inc.,* 43 B.R. 616 (Bkr. E.D. N.C. 1984).

*Readers Service, Inc.*, 81 B.R. 422, 427 (Bkr. S.D. Tex. 1987):

> Often a proceeding, cast in the language of a core proceeding, merely shrouds state law actions under the guise of a bankruptcy issue. A typical example is an adversary proceeding commenced as an action for turnover of property under 11 U.S.C. § 542. An action for turnover of property is a core proceeding under 28 U.S.C. § 157(b)(2)(E). Frequently, a breach of contract claim identical to the cause of action at issue in the *Marathon* [sic] is presented as a core proceeding as inducement for the court to exercise power over the proceeding.

In fact, the court in *In Re Partridge*, 48 B.R. 1006, (Bkr. S.D.N.Y. 1985) assumed jurisdiction on this basis. There, the court concluded that the debtors' contract action against a creditor could be construed as an action for turnover of estate property, and therefore, the contract claim was a core proceeding under 28 U.S.C. § 157 (b)(2)(E). *Id.* at 1010. Such a holding flies in the face of this Court's ruling in *Marathon* that state law based contract claims are non-core proceedings.[9]

In *In re Marketing Resources International*, 43 B.R. 71 (Bkr. E.D. Pa. 1984), the court found the debtor's claim against a creditor for tortious interference with contractual relations to be a core proceeding, on the basis that since the creditor had previously filed a proof of claim, the debtor's complaint could thereby be construed as a "counterclaim", and thus a core proceeding, under 28 U.S.C. § 157(b)(2)(C). As was pointed out in *Bokum*, 49 B.R. at 863, such a mechanical application

9. For a well-reasoned criticism of the holding in *Partridge*, see *In re Satelco, Inc.*, 58 B.R. at 786.

of the statute results in "a return to the much-maligned jurisdiction by ambush which prevailed prior to 1978."

Cases such as *Partridge* and *Marketing Resources,* which interpret the statute broadly, are clearly at odds with *Marathon,* which, at a minimum, held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to appellate review". *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584 (1985).

"Jurisdiction by ambush" accurately describes the bankruptcy court's actions below. By adjudicating petitioners' contract claims, over petitioners' objections, the bankruptcy court extended its jurisdiction to a lawsuit over which it clearly would not have had jurisdiction, but for the fact that the defendant in the contract action was seeking approval of a petition for reorganization. See *Marathon,* 458 U.S. at 90 (Justice Rehnquist, concurring). If, rather than applying the emergency interim rule mechanically,[10] the bankruptcy court below had tempered its reading of the rule in light of *Marathon,* it would have correctly concluded that the state law issues were non-core proceedings, the ultimate resolution of which had to rest with an Article III court. See *Bokum,* 49 B.R. at 866.

To allow the bankruptcy court below to adjudicate petitioners' state law contract claims solely on the basis that a creditor has proposed to dismiss those claims as part of a plan of reorganization, is to beg the underlying

10. It is fundamental that statutes must be construed, if fairly possible, to avoid doubts as to constitutionality. *St. Martin Evangelical Lutheran v. South Dakota,* 451 U.S. 772, 780 (1981).

question and recite a tautology. As was pointed out in *In re Satelco, Inc.*, 58 B.R. at 786, in rejecting the holding of *Partridge*,

> Such an approach is, however, fundamentally flawed. It would turn mere allegation into fact; by asserting that the money attributable to an account receiveable is property of the estate, a debtor could, under the foregoing authorities, establish the constructive possession necessary for the bankruptcy court to exercise jurisdiction.

58 B.R. at 786.

Moreover, *Satelco* hints at another potentially severe problem with this Court's toleration of the expansive view of the statute—the problem of forum shopping. Under the expansive view of the statute, a party can transform an otherwise non-core proceeding into a core proceeding by the use of labelling and procedural gamesmanship in the bankruptcy court. Respondent has engaged in precisely this kind of conduct below, by taking petitioners' non-core, state law related, contract claims, and incorporating their proposed dismissal into respondent's proposed plan of reorganization.

For all of these reasons, the lower courts are sorely in need of this Court's guidance as to the proper interpretation of its decision in *Marathon*, which will directly affect construction of both the Emergency Interim Rule and 28 U.S.C. § 157, particularly in light of the "maelstrom of conflicting decisions" surrounding this issue. See *In re Satelco, Inc.*, 58 B.R. at 783. Since bankruptcy courts are daily confronted with decisions concerning these matters, and the decisions they make affect fundamental constitutional rights, the Fifth Circuit decision should be reviewed now so that the bankruptcy courts will have guidelines in making their decisions.

## III. The Fifth Circuit Decision Should Be Reviewed Because It Incorrectly Applies the Rule Against *Ex Parte* Contacts, and Requires this Court's Exercise of its Supervisory Powers to Regulate Such Conduct

At the conclusion of the evidence, the Bankruptcy Judge announced oral findings of fact, (App. 92a), in which he made numerous findings supporting petitioners' claims of Lockheed's breaches of contract. (*Id.* at 95a-101a). On March 20, 1984, he signed written findings of fact and conclusions of law (App. 119a), which were radically different and omitted the findings of Lockheed's breach.

At the hearing on petitioners' motion to amend the findings, the Bankruptcy Judge stated, and counsel for Lockheed admitted, that there were four drafts of the Findings of Fact and Conclusions of Law submitted to the judge by Lockheed's counsel, and not one of the four drafts was sent to counsel for appellants (Hearing on Motion to Amend the Findings of Fact and Conclusions of Law on April 2, 1984 at 40-57). It was only when a final draft, satisfactory to both counsel for Lockheed and the Bankruptcy Judge, had been prepared and signed, that counsel for petitioners was permitted to receive a copy. Such conduct was in direct violation of Rule 9003 of the Bankruptcy Rules, DR 7-110(B) of the Texas Code of Professional Responsibility and Canon 3A(4) of the Texas Code of Judicial Conduct.

*Ex parte* discussions with a judge are simply not permitted. The Advisory Committee Note to Bankruptcy Rule 9003 states that "this regulation of the conduct of parties in interest and their representative is designed to

insure that the bankruptcy system operates fairly and that no appearance of unfairness is created." This Advisory Committee Note refers to H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 95 *et seq.* (1977) which states

> [T]here is an unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bar. They are in frequent contact with the judge as a result of the necessity for the judge's review of the administrative actions of the trustee or debtor-in-possession. Debtors' attorneys make frequent appearances at the same court representing numerous different debtors. All of these contacts and relationships have led to a feeling among non-bankruptcy practitioners that there is a "bankruptcy ring" that has an inside track on all the bankruptcy matters, including the judges' favoritism.

The reasoning of the Fifth Circuit in permitting the extensive series of *ex parte* discussions in this case has created a standard which is meaningless, and which effectively invites *ex parte* communications. The Fifth Circuit concluded that the matters were no longer "pending" before the Bankruptcy Judge, because he "had already verbally ruled that he was confirming the plan". 844 F.2d at 1164, App. at 44a.

This standard is meaningless because the matter was obviously still "pending" before the Bankruptcy Judge, in that he still retained plenary jurisdiction over all matters relating to the plan of reorganization, and could have reopened the evidence or changed his ruling. Indeed, the Fifth Circuit admits as much when it notes that oral findings are always subject to revision. 844 F.2d at 1164, App. at 45a. Furthermore, the matter was still "pending"

because, as all practitioners know, the exact language of written findings of fact, or indeed of orders or judgments, can often make all the difference in the world on appeal as to affirmance or reversal.

The implications of the Fifth Circuit's holding are disturbing, given the frequent nature of pretrial matters submitted to courts for determination. If the Fifth Circuit's analysis is correct, once an attorney wins any type of pretrial motion, he will be free to engage in extensive discussions with the court concerning that matter, since it is no longer "pending", in the process potentially creating substantial further prejudice against the opposing party. The correct standard which the Fifth Circuit should have applied, and which this Court should emphatically pronounce, is set forth in *In re Wisconsin Steel,* 48 B.R. 753 (N.D. Ill. 1985), in which the district court strongly criticized the bankruptcy court and counsel for the one-time *ex parte* submission of an opinion to the court by counsel.

The decision of the Eleventh Circuit in *In re Colony Square,* 819 F.2d 272 (11th Cir. 1987), which closely parallels the decision of the Fifth Circuit in this case, must likewise be disapproved. Unlike the complaining party in *Colony Square,* who had apparently known for some time of the offending conduct, but not objected until after the decision in *Wisconsin Steel* was announced, see 60 B.R. 1003, 1023, the petitioners here made objections to the written findings of fact immediately after they were received and held a hearing shortly thereafter, all before the decision in *Wisconsin Steel* was announced.

Finally, the reliance by the Fifth Circuit upon the fact that petitioners were allowed the opportunity to make

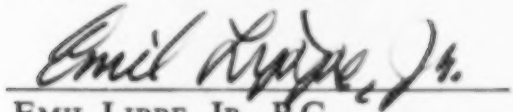
"vigorous" presentation of objections to the written findings, 844 F.2d at 1164, App. at 45a, is totally meaningless. Indeed, the Bankruptcy Judge announced at the beginning of the hearing that since he had gone through four drafts, it was not likely that he was going to make any changes. Such a frank admission by the Bankruptcy Judge below is clearly the likely result whenever counsel attempts, after the fact, to challenge the combined work product of opposing counsel and the judge arrived at behind closed doors.

For these reasons, the outrageous conduct of Lockheed's counsel must be proscribed, and the Fifth Circuit's decision on this point must be reversed, in order to avoid complete circumvention of the rule prohibiting *ex parte* communications. This is a matter of overarching importance to the administration of the federal judiciary, which transcends the bounds of the bankruptcy courts, and which threatens the very appearance of fairness in the federal judicial system. For this reason, this Court should exercise its supervisory power, and reverse the decision of the Fifth Circuit.

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted. Upon final consideration, the written findings of fact should be stricken, and the order of the Bankruptcy Court either reversed, with the matter remanded to the Bankruptcy Court for further action, or, in the alternative, remanded to the District Court for a *de novo* determination of the facts consistent with 28 U.S.C. § 157, and this Court's ruling in *Marathon,* and petitioners should be awarded their costs and general relief.

Respectfully submitted,



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88-417

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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,
*Petitioners,*

v.

LOCKHEED CORPORATION,
*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## APPENDIX A

In the Matter of TEXAS EXTRUSION CORP., Debtor.
TEXAS EXTRUSION CORP.,
Plaintiff-Appellant,

v.

LOCKHEED CORP., and Lockheed Finance Corp., et al.,
Defendants-Appellees.

In the Matter of Richard W. PICKENS, Debtor.
Richard W. PICKENS, et al., d/b/a Gold Sun Aluminum, Inc.,
Plaintiffs-Appellants,

v.

LOCKHEED CORP., Daniel C. Stewart, Trustee of Texas Extrusion Corp. & Disbursing Agent., the Official Creditors Committee of Texas Extrusion Corp., Lookheed Finance Corp., and Lockheed California Co., et al., Defendants-Appellees.

In the Matter of PICKENS INDUSTRIES, INC.,
Debtor.

PICKENS INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

LOCKHEED CORPORATION, et al.,
Defendants-Appellees.

In the Matter of Louise
PICKENS, Debtor.
Louise PICKENS d/b/a Gold Sun
Aluminum, Inc., Plaintiff-Appellant,

v.

LOCKHEED CORPORATION, et al.,
Defendants-Appellees.

Nos. 84-1326, 84-1387, 87-1075, 84-1449,
87-1077, 87-1074, and 87-1076.

United States Court of Appeals,
Fifth Circuit.

May 12, 1988.

Rehearing Denied June 7, 1988.

Appeals were taken from bankruptcy court orders affecting four related bankruptcies. The United States District Court for the Northern District of Texas, 68 B.R. 712, Robert W. Porter, Chief Judge, affirmed in part, holding that bankruptcy court's findings concerning attorney fees were clearly erroneous. The Court of Appeals, 836 F.2d 217, affirmed the district court's vacating of findings and conclusions relating to fee order. Thereafter, in consolidated appeals from confirmation of joint plan of reorganization by four debtors subject to plan, on appeals that also raised numerous ancillary matters, the Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) any error by bankruptcy court in applying federal civil rule to appoint debtors' attorney to execute documents required under plan on debtors behalf if they did not do so, before debtors had failed to comply with particular act mandated by court order within time speci-

fied, was harmless; (2) bankruptcy court order approving disclosure statement was not final order for purposes of determining timeliness of appeal from such order, and (3) "good cause" existed for reducing one individual debtor's exclusive 120-day period to file reorganization plan, under former statute.

Affirmed.

---

Emil Lippe, Jr., Edward A. Galloway, Michael D. Mosher, Lippe & Lay, Dallas, Tex., for plaintiffs-appellants in Nos. 84-1326, 84-1387 and 84-1449.

Emil Lippe, Jr., Lippe & Associates, Dallas, Tex., for plaintiffs-appellants in Nos. 87-1074 to 87-1077.

James B. Harris, Sam P. Burford, Debra D. McCullough, Thompson & Knight, Dallas, Tex., for Lockheed, et al.

Stephen A. McCartin, Gardere & Wynn, Dallas, Tex., for official creditors.

David W. Elmquist, Daniel C. Stewart, Winstead, McGuire, Sechrist & Minick, Dallas, Tex., for trustee in Nos. 84-1326, 84-1387 and 84-1449.

Davis W. Elmquist, Winstead, McGuire, Sechrist & Minick, Dallas, Tex., for trustee in Nos. 87-1074 to 87-1077.

Appeals from the United States District Court for the Northern District of Texas.

Before WILLIAMS and HIGGINBOTHAM, Circuit Judges, and SANDERS,* District Judge.

JERRE S. WILLIAMS, Circuit Judge:

This case involves the consolidated appeals of the confirmation of a joint plan of reorganization by the four debtors subject to the plan. The four debtors also raise numerous ancillary matters in the various appeals. We affirm.

I. *Factual Background and Prior Proceedings*

Texas Extrusion Corporation was a manufacturer of hard alloy aluminum extrusions commonly used in aircraft frames. Richard and Louise Pickens, husband and wife, together owned more than 80% of the stock of Pickens Industries, Inc., which in turn owned 100% of the stock of Texas Extrusion. Richard Pickens was the principal operating officer of Texas Extrusion.

In 1979, Texas Extrusion established a contractual relationship with Lockheed Corporation and several of Lockheed's affiliates. Under this arrangement, Lockheed committed itself to purchase certain quantities of hard alloy aluminum extrusions from Texas Extrusion which Texas Extrusion committed itself to produce. Lockheed Finance Corporation, a Lockheed affiliate, loaned Texas Extrusion $5.0 million to modify existing equipment and plant facilities to manufacture the hard alloy aluminum extrusions for the Lockheed contract. Prior to this, Texas Extrusion had manufactured mainly soft alloy extrusions.[1]

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* District Judge of the Northern District of Texas, sitting by designation.

1. Apparently it was at the request of Lockheed that Pickens Industries, Inc. be formed and that 100% of the stock of Texas Extrusion be transferred to the company.

Numerous disputes soon arose between Texas Extrusion and Lockheed. Apparently Lockheed's demand for aluminum extrusions from Texas Extrusion decreased substantially. Since the revenues of Texas Extrusion at that time were derived primarily from the Lockheed contract, Texas Extrusion defaulted on its repayment of the $5.0 million loan from Lockheed Finance. In September 1981, Texas Extrusion and Lockheed executed a second group of contracts in an attempt to resolve their disputes.[2] Additional money was loaned to Texas Extrusion by Lockheed. Despite this attempt at reconciliation, Lockheed was unable to increase its demand for aluminum extrusions from Texas Extrusion or find alternative purchasers, and Texas Extrusion once again defaulted on the repayment of its loan from Lockheed Finance. Texas Extrusion and its parent corporation, Pickens Industries, Inc., filed voluntary petitions for bankruptcy in the Northern District of Texas under Chapter 11 on March 24, 1982. At this point, Texas Extrusion owed Lockheed Finance $7,140,000 in principal and accrued interest on the loans which was secured by liens in substantially all of the assets of Texas Extrusion. Texas Extrusion also had unsecured indebtedness of approximately $4,354,000.

Texas Extrusion, as debtor-in-possession, immediately filed adversary proceedings in the bankruptcy court on March 26, 1982, against Lockheed and Lockheed Finance, alleging fraud, fraudulent conveyances, and breach

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2. Lockheed claims that in one of the 1981 contracts, Texas Extrusion waived and released all of its claims under the 1979 contracts and that the 1981 contracts totally supersede and replace the 1979 contracts. The Pickenses argue that the waiver in the 1981 contract was signed under duress and fraudulent inducement and seek its rescission.

of contract. Texas Extrusion sought actual damages of $40 million and punitive damages of $80 million.[3]

Richard Pickens filed for personal bankruptcy under Chapter 11 on January 3, 1983, and Louise Pickens filed for personal bankruptcy under Chapter 11 on November 21, 1983. The Pickenses had personally guarantied a portion of the loans from Lockheed Finance. Lockheed had filed suit in federal district court against the Pickenses on December 14, 1982, to recover on the personal guaranties they had executed on the Lockheed loans. The Pickenses also filed a lawsuit as individuals against Lockheed and several of its affiliates (the "individual lawsuit"), on November 15, 1983. This "individual lawsuit" alleged many of the same matters set forth in the "corporate lawsuit" and alleged additionally that Lockheed's conduct had forced the Pickenses to lose personal assets and file for personal bankruptcy. The suit alleged misrepresentation and breach of contract by Lockheed. The

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3. This adversary proceeding, the "corporate lawsuit," alleged that Lockheed had approached Richard Pickens and contracted to purchase certain quantities of hard alloy aluminum extrusions from Texas Extrusion for a contract term of 10 years. Texas Extrusion alleged it was required to forego selling to any substantial customers other than Lockheed. Once its expansion was completed, Texas Extrusion alleged that Lockheed breached the contract by refusing to purchase the amounts for which it had contracted. Texas Extrusion alleged that Lockheed continued to purchase aluminum extrusions from other sources even though Texas Extrusion had the ability to supply Lockheed's needs. Texas Extrusion alleged that because it was totally dependent on Lockheed as its only substantial customer, Lockheed's breach rendered Texas Extrusion unable to meet its loan repayment obligations to Lockheed Finance and was forced into bankruptcy. The "corporate lawsuit" was filed as an adversary proceeding in the bankruptcy court, transferred to the district court, and then referred back to the bankruptcy court.

Pickenses sought actual and punitive damages of at least $15.5 million.[4]

On September 9, 1983, the United States Trustee for the Northern District of Texas[5] and the Official Creditors' Committee of Texas Extrusion[6] filed an application for the appointment of a trustee for Texas Extrusion in its bankruptcy proceedings. This application was allegedly brought about by Texas Extrusion's actions as debtor-in-possession of accumulating substantial unpaid post-petition liabilities of nearly $1 million. On October 28, 1983, the bankruptcy court granted the application, and on October 31, 1983, the United States Trustee appointed Daniel Stewart as Bankruptcy Trustee for Texas Extrusion. On November 21, 1983, Trustee Stewart informed the bankruptcy court that he believed Texas Extrusion could not be operated at a profit and would continue to incur further unpaid post-petition liabilities unless there was an infusion of new capital into the corporation. The bankruptcy court thereupon ordered the cessation of the operations of Texas Extrusion.

On November 23, 1983, Lockheed, which was Texas Extrusion's largest secured creditor, and the Official

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4. These damages allegedly arose from the loss of personal property which served as collateral for the Pickenses' personal guaranties on the Lockheed loans and from their third party beneficiary interests in the Lockheed contract through their ownership interests in Pickens Industries and Texas Extrusions. This "individual lawsuit" was originally filed in federal district court and assigned to District Court Judge Robert Porter. The case remained there until it was dismissed on April 23, 1984, pursuant to the reorganization plan.

5. *See* former 11 U.S.C. § 1501. These provisions of the Bankruptcy Code were repealed in 1986.

6. This group consisted of the Texas Extrusion creditors holding unsecured claims and was formed pursuant to 11 U.S.C. § 1102.

Creditors' committee of Texas Extrusion filed a joint plan of reorganization for Texas Extrusion, Pickens Industries, and Richard Pickens. None of these three debtors had filed a plan of reorganization prior to this. Amended plans were later filed on December 23, 1983, and on January 25, 1984, which included the bankruptcy estate of Louise Pickens.[7] The original disclosure statement for the joint plan of reorganization was filed on December 23, 1983, by Lockheed and the Creditors' Committee. The bankruptcy court granted a motion by Lockheed and the Creditors' Committee to shorten the time for objections to the disclosure statement and set a date for the hearing on the disclosure statement for January 13, 1984. After the hearing, during which over 40 objections by the Pickenses to the disclosure statement were considered by the bankruptcy court, the court approved a First Amended Disclosure Statement which incorporated many of the changes requested by the Pickenses. Also on January 13, 1984, Lockheed moved to reduce Louise Pickens' 120-day exclusive time period to file a plan of reorganization and to make the disclosure statement applicable to her estate. On January 24, 1984, the bankruptcy court signed an order terminating Louise Pickens' exclusive time to file a plan as of 5:00 p.m. that day. The court then included Louise Pickens' case in the joint reorganization and applied the disclosure statement to her estate. The Second Amended Joint Plan of Reorganization ("the Plan") and the approved First Amended Disclosure Statement (the "Disclosure Statement") were filed on January 25, 1984. The bankruptcy court ordered all objections to the Plan

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7. The Pickenses have continually asserted that the bankruptcy proceedings of Texas Extrusion, Pickens Industries, Richard Pickens and Louise Pickens have been substantively consolidated without proper court order.

be filed by February 17, 1984, and all votes on the Plan be completed by February 21. The court set a hearing on the confirmation of the Plan for February 22, 1984.

One week prior to the scheduled confirmation hearing on the Plan, the debtors retained additional counsel, Barlow & Lippe.[8] The debtors, through attorney Emil Lippe, then instituted a flurry of activity in the bankruptcy proceedings, including: (1) on February 13, 1984, Richard Pickens, through Emil Lippe, mailed a letter to all the creditors in all four bankruptcy proceedings seeking their rejection of the Plan;[9] (2) on February 15, 1984, Louise Pickens converted her bankruptcy proceeding from Chapter 11 to Chapter 7;[10] (3) on February 15, 1984, the debtors filed a motion to allow Pickens Industries to intervene in the corporate lawsuit; (4) on February 16, 1984, the debtors filed a motion to disqualify Lockheed's counsel (Thompson & Knight) from further participation in the proceedings; (5) on February 16, 1984, the debtors filed notices of 3 depositions; (6) on February 17, 1984, Richard and Louise Pickens filed their objections to the confirmation of the Plan; and (7) on February 21, 1984, the debtors

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8. The bankruptcy court later denied the emergency application of Texas Extrusion to employ Barlow & Lippe as additional counsel. The court approved, however, the applications of the three other debtors to employ Barlow & Lippe as additional counsel. The firm of Palmer, Palmer & Coffee had been representing all four debtors in various capacities prior to this time. *See Matter of Texas Extrusion*, 836 F.2d 217 (5th Cir. 1988).

9. The Creditors' Committee filed a motion to hold Richard Pickens and Emil Lippe in contempt for this letter. The bankruptcy court denied the motion.

10. On February 21, 1984, Lockheed filed a motion to reconvert Mrs. Pickens' case back to a Chapter 11 proceeding. The court granted this motion on February 22.

filed motions for leave to amend the corporate and individual lawsuits to advance several new theories of recovery including various anti-trust claims against Lockheed and Cressona Aluminum Company[11] and to increase substantially the requested damages.

The hearing on the confirmation of the Plan began on February 22, 1984, and was completed on March 3, 1984, after four days of testimony. The Bankruptcy Trustee of Texas Extrusion and the Creditors' Committee of Texas Extrusion supported the Plan although only Lockheed and the Creditors' Committee were official proponents of the Plan. Only Lockheed was a proponent of the Plan as to all four of the debtors. No alternative reorganization plans for any of the four debtors were proposed by anyone. On March 3, 1984, the bankruptcy court announced that it was confirming the Plan over the objections of Richard and Louise Pickens and Pickens Industries. The court made lengthy verbal findings of fact at that time. Shortly afterwards, upon the request of the bankruptcy court, Lockheed's counsel, Thompson & Knight, began submitting proposed findings of fact and conclusions of law to the bankruptcy court. No copies of these proposed findings and conclusions were served upon counsel for the Pickenses. Apparently these proposed findings and conclusions went through four drafts and were signed by the bankruptcy judge without the Pickenses or their counsel knowing about any of this until after the fact. On March 20, 1984, the bankruptcy court officially confirmed the Second Amended Joint Plan of Reorganiza-

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11. Under the Plan, Cressona was to purchase the principal assets of Texas Extrusion and certain extrusion equipment, land, and improvements belonging to the Pickenses.

tion, and issued its written findings of fact and conclusions of law.

The Plan provided for: (1) the purchase by Cressona Aluminum Company of the principal assets of Texas Extrusion and certain extrusion equipment, land, and improvements belonging to Richard and Louise Pickens with payment going to Lockheed in partial satisfaction of Lockheed's security interest in the purchased property;[12] (2) mutual releases between the debtors and Lockheed with respect to all litigation existing between them, resulting in the dismissal with prejudice of all the lawsuits the parties had against each other (including the debtors' various lawsuits against Lockheed and lockheed's $7,140,000 claim against Texas Extrusion); (3) the payment of all first lien indebtedness to third party creditors in the real property of the Richard Pickens sold to Cressona (approximately $450,000); (4) the payment by Lockheed of all allowed post-petition claims, including all administrative expenses, against the debtors in all four estates (approximately $900,000); and (5) the payment by Lockheed to the unsecured creditors in the Texas Extrusion estate in the amount of $475,000 on a pro rata basis. In its order confirming the Plan, the bankruptcy court ordered the conveyances of the real property be free and clear of all liens, claims, and encumbrances pursuant to 11 U.S.C. § 363. The net result of the Plan was that the debtors received a settlement

12. Cressona paid $1.55 million for the assets of Texas Extrusion. Lockheed received this entire amount, having the first lien on these assets. Cressona paid $882,601 for land and improvements owned by Richard Pickens. Lockheed, being a junior lienholder as to these assets, received the amounts remaining after the claims of the first lienholders were satisfied.

from Lockheed of approximately $7.0 million for their various lawsuits.

The Pickenses moved that the March 20, 1984, order confirming the Plan and the written findings of fact and conclusions of law be amended and that implementation of the order of confirmation be stayed. The bankruptcy court denied these motions with minor exceptions. On April 9, 1984, the Pickenses filed notice of appeal to the district court on these motions. The Pickenses also sought from the district court a stay of the order of confirmation pending its appeal. After an evidentiary hearing was held before the district court on April 10, 1984, the district court on April 13, 1984, denied the motion for the stay before the district court and affirmed the bankruptcy court's denial of a stay. Applications for an emergency stay and a temporary restraining order were made to this Court on April 13, 1984. This Court after telephonic conference denied these motions.

Also during this time, on April 11, 1984, counsel for the Creditors' Committee of Texas Extrusion sent a demand letter to Richard Ward and Emil Lippe requesting that their client, Richard Pickens, expressly state his willingness, on or before 5:00 P.M. April 12, 1984, to comply with the bankruptcy court's order confirming the Plan and to attend the closing that was tenatively scheduled to occur on April 16, 1984. There was no response to this letter. On April 13, 1984, counsel for the Creditors' Committee filed a motion to apply Bankruptcy Rule 7070 and an application for the appointment of Richard Ward of Palmer, Palmer & Coffee, counsel for the Pickenses, for the purpose of executing the necessary conveyance and release documents on behalf of the Pickenses in the event

the Pickenses did not show up for the closing or refused to execute these documents themselves.

On April 16, 1984, a hearing was held on the motion to apply Bankruptcy Rule 7070. The motion was opposed by the Pickenses on the ground that there had been no predicate failure to comply with the order confirming the Plan, or with any other order of the court, by the Pickenses as required by Bankruptcy Rule 7070 and Fed. R. Civ. P. 70. Also at this hearing, counsel for the Creditors' Committee verbally moved that a lis pendens notice previously filed by Emil Lippe on behalf of the debtors be canceled.[13] This lis pendens, which covered the real property on which the Texas Extrusion manufacturing facility was located and which was to be sold to Cressona Aluminum, was filed on March 6, 1984, three days after the oral confirmation of the Plan by the bankruptcy court.[14]

During the hearing, the bankruptcy court held that a failure by the Pickenses to comply with its order confirming the Plan was not a condition precedent under Fed. R. Civ. P. 70 to the appointment of a third person to perform the ordered acts. The court expressed its

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13. During the hearing, counsel for the Creditors' Committee stated that the title insurance company which was issuing the title policy to Cressona covering the real estate being purchased under the Plan had excepted from its coverage the lis pendens notice filed against the subject property. Counsel asked the court to order the Pickenses' counsel under Rule 7070 to execute any documents necessary to release this lis pendens notice.

14. The sole purpose of the lis pendens apparently was to insure that Cressona Aluminum Company had notice of the Pickenses' appeal of the order confirming the Plan. On March 8, 1984, attorney Lippe filed a Supplementary Notice of Lis Pendens stating that the debtors challenged the authority of the bankruptcy court to authorize the sale of the subject property pursuant to 11 U.S.C. § 363.

concern that Richard Pickens might not execute the documents of conveyance and release at the closing as required. The court declared the notice of lis pendens a nullity and ordered it canceled. In its April 16, 1984, Order the bankruptcy court approved the application of Bankruptcy Rule 7070 and directed Richard Ward to execute and deliver all conveyance and release documents at the time of the closing on behalf of the Pickenses in the event they did not show up at the closing or refused to sign the necessary documents. This order was certified immediately for appeal and affirmed by the district court.

At the closing, which occurred on April 20, 1984, Richard Ward, acting on behalf of the Pickenses pursuant to the court order, executed the documents of conveyance to Cressona Aluminum Company for all the real and personal property and executed the release of the Pickenses' claims against Lockheed. Bankruptcy Trustee Stewart signed the conveyance documents and the release on behalf of Texas Extrusion. Orders of dismissal with prejudice were thereafter entered in the two lawsuits against Lockheed.

Asserting that this Court had jurisdiction under 28 U.S.C. §§ 1291, 1292 and 1293, the Pickenses sought immediate appeal to this Court of several of these actions: (1) the April 16, 1984, district court order approving the bankruptcy court order canceling the lis pendens filed by the Pickenses and directing application of Bankruptcy Rule 7070; (2) the dismissal of the Pickenses' individual lawsuit against Lockheed by the district court on April 23, 1984; and (3) the order of the district court denying the Pickenses' motion to stay the effectiveness of the bankruptcy court's order confirming the Plan pending appeal.

These appeals were consolidated on May 17, 1984 ("the 1984 appeals").

The relief the Pickenses sought in these 1984 appeals included the reinstatement of the lis pendens effective retroactively to the date of its earlier cancellation and the cancellation of all the deeds of conveyance and the release executed by Richard Ward on behalf of the Pickenses pursuant to Bankruptcy Rule 7070. Lockheed, Trustee Stewart, and the Creditors' Committee filed a motion of dismissal for the 1984 appeals based on this Court's lack of jurisdiction under 28 U.S.C. §§ 1291, 1292, and 1293. We denied this motion on October 9, 1984. This Court, however, delayed hearing these 1984 appeals until the debtors' appeal of the confirmation of the Plan itself was before the Court.

The Pickenses appealed the actual confirmation of the Plan to the district court on April 9, 1984. They moved for the recusal of District Court Judge Robert Porter on the basis that he had previously ruled upon certain ancillary matters relating to the Plan—those subject to the 1984 appeals. They argued that since Judge Porter had in effect already participated in the implementation of the Plan, it was improper for him to act as an appellate judge on the appeal of the Plan. This motion to recuse Judge Porter was denied.

Numerous and voluminous briefs were filed in the appeal to the district court of the confirmation of the Plan. On March 1, 1985, while the appeal to the district court was pending, Emil Lippe filed another Original Complaint and Jury Demand in the United States District Court for the Eastern District of Texas on behalf of all four debtors. This lawsuit alleged essentially the

same claims as the earlier proposed amended corporate and individual lawsuits, including the antitrust claims, although these theories of recovery had been polished up somewhat by attorney Lippe in the interim.

District Judge Porter on August 27, 1985, ordered the debtors to refrain from proceeding any further with the lawsuit in the Eastern District pending further order.[15] Judge Porter issued a Memorandum Order on December 30, 1986, affirming the bankruptcy court's confirmation of the Plan. 68 B.R. 712 (N.D. Tex. 1986). The Pickenses are now appealing this order to this Court in addition to reurging the matters brought in their 1984 appeals.[16] The case currently before this Court, therefore, involves the consolidated appeals of the four separate bankruptcy estates of the district court's affirmation the bankruptcy court's confirmation of the Plan and also the 1984 appeals.

## II. *Issues from the 1984 Appeals*

### A. Cancellation of the Lis Pendens

[1] The notice of lis pendens filed by attorney Lippe on behalf of the debtors on March 6, 1984, and the supplemental notice of lis pendens filed by Lippe on March 8, 1984, were properly declared void by the bankruptcy court and canceled. The bankruptcy court stated during the April 16, 1984, hearing that this

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15. In this same order, Judge Porter denied Lockheed's motion for sanctions against the debtors for filing the 1985 lawsuit and denied the debtor's motion for sanctions against Lockheed for filing the motion for sanctions against the debtors.

16. Apparently, Emil Lippe now also represents Texas Extrusion in some capacity, at least by default. *See Matter of Texas Extrusion,* 836 F.2d 217 (5th Cir. 1988).

notice of lis pendens was in violation of the automatic stays in the bankruptcy proceedings. We do not address that issue but merely hold that the filing of the lis pendens notice was not authorized by Texas statute and thus of no effect.

Tex. Prop. Code Ann. § 12.007(a) describes in general terms those situations in which a lis pendens is authorized by Texas law:

> After the plaintiff's statement in an eminent domain proceeding is filed or during the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property, a party to the action who is seeking affirmative relief may file for record with the county clerk of each county where a part of the property is located a notice that the action is pending.

None of these situations was involved in the case at bar. The Pickenses were merely appealing the confirmation of the joint plan of reorganization which had provisions requiring the conveyance of certain real property by the Pickenses. There was no action involving title to this property, over the establishment of an interest in this property, or over the enforcement of an encumbrance against this property. The real property involved was merely to be conveyed to Cressona Aluminum Company.

[2] Under such circumstances, it was proper for the bankruptcy court to declare the lis pendens void and call for its immediate cancellation. *Helmsley-Spear of Texas, Inc. v. Blanton,* 699 S.W.2d 643 (Tex. Ct. App.—Houston [14th Dist.] 1985, *no writ*); *Milberg Factors v. Hurwitz-Nordlicht,* 676 S.W.2d 613 (Tex. Ct. App.—

Austin 1984, writ ref'd n.r.e.); *Lane v. Fritz,* 404 S.W. 2d 110 (Tex. Civ. App.—Corpus Christi 1966, *no writ*). When a lis pendens is not authorized under Texas law, the court need not follow the procedures prescribed by Tex. Prop. Code Ann. § 12.008 to cancel it. *Hemsley-Spear of Texas,* 699 S.W.2d at 645. No additional procedural requirements are mandated by Bankruptcy Rule 9014 for the cancellation of an invalid lis pendens. As the appellants themselves emphasize, state not federal law governs the creation and cancellation of a lis pendens. *Beefy King International, Inc. v. Veigle,* 464 F.2d 1102 (5th Cir. 1972).

B. Application of Rule 70 and the Dismissal of the Individual Lawsuit

[3] The Pickenses raise several issues in their challenge to the bankruptcy court's application of Fed. R. Civ. P. 70 through Bankruptcy Rule 7070 and the appointment of their attorney, Richard Ward, to execute the documents required under the Plan on their behalf if they did not do so. Under the Plan and the court order confirming the Plan, the Pickenses were required to execute a release for the individual lawsuit and documents to convey marketable title to Cressona Aluminum and the Small Business Administration to certain property owned by the Pickenses. The Pickenses claim that a prerequisite to the application of Rule 70 is that a party must first fail to comply with a particular act mandated by court order within the time specified under that court order before the court may direct the act be performed by some other person appointed by the court. They assert that this prerequisite did not occur in this case. They also claim that the bankruptcy court failed to make

specific findings of fact pursuant to Bankruptcy Rule 7052 and Fed. R. Civ. P. 52 to support the imposition of Rule 70 as to Louise Pickens and Pickens Industries. Finally, they assert that there was not sufficient evidence in the record to support the bankruptcy court's belief that Richard Pickens would not timely perform the acts ordered to be performed by him by the court order confirming the plan.

We express no opinion as to the propriety of the imposition of Rule 70 by a court in anticipation of the failure of a party in the future to perform specific acts required by a court order. If there was error by the bankruptcy court in doing this, we deem it harmless error. 28 U.S.C. § 2111; *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed. 2d 663 (1984). The Pickenses had the opportunity to show up and execute the necessary conveyance and release documents themselves at the closing. Their attorney merely signed on their behalf once they failed to do so; this was simply a ministerial act. The Pickenses fail to show any harm at all suffered by them because of the imposition of Rule 70 and the appointment of their attorney to act on their behalf in performing these tasks. The Pickenses were required by court order to execute these documents and would eventually have had to execute them or suffer the imposition of Rule 70. The Pickenses' vague claims of denial of due process therefore do not withstand scrutiny. This alleged error did not affect any of their substantial rights. 28 U.S.C. § 2111.

Even assuming the court was required to make specific findings of fact under Bankruptcy Rule 7052 and Fed. R. Civ. P. 52 to support the imposition of Rule 70 as

to Louise Pickens and Pickens Industries, the error of not doing so was harmless. For similar reasons, we decline to rule whether the bankruptcy court erred in determining that it was likely that Richard Pickens would fail timely to perform the acts required of him by the court order confirming the Plan. If there was error, it was harmless.

Overall, we find no merit in the Pickenses' challenges to the bankruptcy court order imposing Rule 70, the district court's approval of this order, and the subsequent dismissal of the individual lawsuit by the district court pursuant to the release signed by Richard Ward on the Pickenses' behalf under Rule 70.

### C. The Requests for Injunctive Relief

We had previously, on April 13, 1984, denied appellants' motion for a stay pending the appeal of the Joint Plan of Reorganization. We now hold that none of the claims from the 1984 appeals have any merit. As a result, there is absolutely no basis upon which injunctive relief can be granted. We deny appellants all the relief requested in their 1984 appeals, leaving for consideration the appeals relating to the Disclosure Statement and the confirmation of the Joint Plan of Reorganization.

## III. *The Disclosure Statement*

The district court did not address the merits of the appellants' appeal of the bankruptcy court order approving the Disclosure Statement. The district court held that it did not have jurisdiction over the appeal of the order approving the Disclosure Statement because the notice of appeal was not timely. We must disagree.

A. Appealability of a Disclosure Statement

[4] Clearly, a district court lacks jurisdiction over an appeal from a bankruptcy court that is not timely filed. *Matter of Robinson*, 640 F.2d 737, 738 (5th Cir. 1981). The issue in this case is whether appellants timely filed their notice of appeal concerning the bankruptcy court's order approving the Disclosure Statement so that the district court had jurisdiction over the question of whether that approval was proper. The order approving the First Amended Disclosure Statement was entered on January 25, 1984. Bankruptcy Rules 8001 and 8002 allow ten days to file the notice of appeal from *final* orders of the bankruptcy court. The issue therefore becomes: Was the bankruptcy court order approving the Disclosure Statement a *final* order which must be appealed within ten days under Rule 8002 or forever waived? If the order approving the Disclosure Statement was a final order, then appellants failed to make a timely appeal of the order. Their notice of appeal of this order was made on April 9, 1984, along with their appeal of the order confirming the Plan. The district court held that the bankruptcy court order approving the Disclosure Statement was a final order and dismissed the appeal as to the Disclosure Statement for lack of jurisdiction.

We are not persuaded that a bankruptcy court order approving a disclosure statement is a final order for purposes of appeal. The district court based its conclusion on two independent reasons. The district court's first reason stemmed from an implication found in the language in Bankruptcy Rule 8002(c) that notices of appeal *may* be filed immediately from orders approving disclosure statements, and such notices of appeal or requests to extend the time for filing notices of appeal must be

made within ten days. The district court saw this language as implying that such orders are final and therefore *must* be appealed within ten days or the appeal is forever waived. There is also language in the Advisory Committee Note following Rule 8002 that can be read to imply that a bankruptcy court order approving a disclosure statement is a final order and therefore some indication of appeal must be filed within ten days of its entry or the appeal is forever waived.

We hold, however, that such inferences from the language of the Bankruptcy Rules are not sufficient to establish that bankruptcy court orders approving disclosure statements are final orders. We also have some doubts that such inferences are even necessarily correct. Neither the Bankruptcy Code nor the Bankruptcy Rules expressly set out which orders, judgments, or decrees of the bankruptcy court are final for purposes of appeal, and we hesitate to categorize certain orders as final based on the possible implications of two Bankruptcy Rules. Furthermore, these implications are in clear conflict with case law which sets out the criteria for determining which orders are final for purposes of appeal in the bankruptcy context and with the realities of the bankruptcy process.

Each party has cited only one case actally discussing the appealability of an order approving a disclosure statement. These two cases reach opposite conclusions. *Compare In re Waterville Timeshare Group,* 67 B.R. 412 (Bankr. D. N.H. 1986) (approval of a disclosure statement is an interlocutory action) *with In re Synder,* 56 B.R. 1007 (D. Ind. 1986) (order approving disclosure statement is a final order). We have found no Circuit court opinions on this issue and only one additional dis-

trict court opinion. *In re Elsinore Shore Associates,* 82 B.R. 339 (D. N.J. 1988) (interlocutory).

Our analysis of analogous case law convinces us that an order approving a disclosure statement is not a final order for purposes of appeal but instead is an interlocutory order. In the nonbankruptcy context, a final order "must generally be 'one which ends the litigation . . . and leaves nothing for the court to do but execute the judgment.' " *Matter of Kutner,* 656 F.2d 1107, 1110 (5th Cir. 1981), (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L.Ed. 911 (1945)), *cert. denied,* 455 U.S. 945, 102 S. Ct. 1443, 71 L.Ed.2d 658 (1982). *See also In re Moody,* 817 F.2d 365, 366-67 (5th Cir. 1987); *In re County Management, Inc.,* 788 F.2d 311, 313 (5th Cir. 1986). The order sought to be appealed must "conclusively determine substantive rights of parties" in order to be considered final. *In re Delta Services Industries,* 782 F.2d 1267, 1270 (5th Cir. 1986). We recognize that the rules as to finality differ somewhat in the bankruptcy context. A case need not be appealed as a "single judicial unit" at the end of the entire bankruptcy proceeding, *In re Saco Local Development Corp.,* 711 F.2d 441, 444 (1st Cir. 1983), but the order must constitute a " 'final determination of the rights of the parties to secure the relief they seek in this suit' " *In re County Management,* 788 F.2d at 313 (quoting *In re Emerald Oil Co.,* 694 F.2d 88, 89 (5th Cir. 1982)), or the order must dispose of a discrete dispute within the larger bankruptcy case, *In re Moody,* 817 F.2d at 367, for the order to be considered final.

Under these authorities, the approval of a disclosure statement is only one step in the process of the approval

and confirmation of a plan of reorganization under Chapter 11 of of the Bankruptcy Code. By no stretch of the imagination does the approval of a disclosure statement resolve any discrete dispute among the various parties involved within the larger bankruptcy proceeding or determine the rights of the parties to secure their requested relief. *See In re Elsinore Shore Associates; In re Waterville Timeshare Group,* both *supra.* The types of orders that have been held to constitute final orders in the bankruptcy context for purposes of appeal[17] are quite different from an order approving a disclosure statement.

[5] We, of course, are not holding that a party in interest cannot appeal an order approving a disclosure statement immediately upon that order's entry. Rather we are holding that the party does not lose its right to appeal the disclosure statement if it fails to file an immediate appeal. The party can pursue the procedures for obtaining an interlocutory appeal which the district court has discretion to allow.[18] 28 U.S.C. § 158(a) Bankruptcy Rule 8001(b). " '[T]his safety valve . . . should serve as adequate protection against the hardships which may be created by erroneous interlocutory bankruptcy court orders.' " *In re Delta Services,* 782 F.2d at 1271, (quot-

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17. For example, an order requiring an individual to turn over a valuable antique coin to the bankruptcy trustee, *In re Moody, supra;* an order holding that a claim was entitled to priority status and thus was not a general unsecured claim, *In re Saco Local Development, supra;* an order disallowing a homestead exemption, *In re White,* 727 F.2d 884 (9th Cir. 1984); and an order directing a debtor to pay the expenses of a creditors' committee, *Matter of UNR Industries, Inc.,* 736 F.2d 1136 (7th Cir. 1984).

18. This court, however, cannot hear appeals from interlocutory orders in bankruptcy cases. Our jurisdiction is limited to appeals from final orders. *In re Delta Services,* 782 F.2d at 1268; 28 U.S.C. § 158(d).

ing *In re American Colonial Broadcasting Corp.*, 758 F.2d 794, 803 (1st Cir. 1985)).[19]

Finally, a blanket rule holding that an order approving a disclosure statement is a final order requiring immediate appeal, or the appeal is forever waived, fails to recognize the mechanics of the confirmation process. A disclosure statement is sent to each of the debtor's creditors, usually along with a copy of the plan of reorganization and a ballot for purposes of informing the creditor and obtaining the creditor's approval of the plan. A creditor may not even receive a copy of the disclosure statement until after ten days from the entry of the order approving the disclosure statement.[20] It is lacking any realism, then, to require that creditor to file a notice of an appeal contesting the order approving the disclosure statement before the creditor even receives the disclosure statement or at least has an opportunity to look closely at either the disclosure statement or the Plan.[21]

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19. Bankruptcy Rule 8002 would require notice of an interlocutory appeal, or a motion for extension for filing a notice of appeal, to be made within ten days of the entry of the order. Of course, a party may also appeal the approval of a disclosure statement along with its appeal of the order confirming the plan of reorganization just as it can appeal any other interlocutory order at that time.

20. In the case at bar, the bankruptcy court specified that a copy of the Disclosure Statement, a copy of the Plan, and a ballot be transmitted by mail to each of the debtors' creditors within three days of the entry of the order approving the Disclosure Statement. It is not unheard of for mail not to reach a destination within the United States within 7 days.

21. In the case at bar, the creditors had until February 21, 1984, to accept or reject the Plan. If we hold that the disclosure statement was a final order, the creditors only had until February 5, 1984, to file their notice of appeal of the order approving the disclosure statement.

We recognize that in this case it is the *debtors* who are contesting the approval of a disclosure statement filed by a creditor and a

B. Adequacy of the Disclosure Statement

[6] Although the district court did not reach the merits of appellants' challenge of the order approving the Disclosure Statement, considerations of judicial economy convince us to address these issues in this appeal. Since orders approving disclosure statements are "core proceedings" under 28 U.S.C. § 157, a district court in reviewing such orders applies the "clearly erroneous" standard to findings of fact and considers issues of law de novo. *See* Bankruptcy Rule 8013; 1 Collier on Bankruptcy ¶ 3.03 [7] (1979). This Court applies the same standard of review. No purpose would be served in remanding this matter back to the district court—the record is adequate for us to exercise the identical review of the order.

[7] 11 U.S.C. § 1125 requires that prior to the solicitation of an acceptance or rejection of a plan of reorganization from a creditor, the creditor must receive a copy of the plan, or a summary of the plan, and a written dis-

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creditors' committee who were also the proponents of the plan of reorganization. The debtors were well aware of their objections to the disclosure statement at the time the bankruptcy court approved the disclosure statement since their counsel was actively involved in the hearing on the disclosure statement and had previously filed over 40 objections to the disclosure statement on behalf of the debtors. A ten day limitation would place no undue hardship on parties such as these. This is not true, however, in the case of a creditor who is not actively involved in the bankruptcy proceeding and whose primary information regarding the proceeding is derived from the disclosure statement. This is precisely the type of creditor a disclosure statement under 11 U.S.C. § 1125 is addressed to and is meant to inform. A ten day limitation on appeal for such a party is quite unrealistic. Furthermore, it would not be proper, or even consistent, to call an order approving a disclosure statement a final order when the debtor (or someone else who is closely following the bankruptcy proceeding) wants to appeal the order, but an interlocutory order when a relatively uninvolved creditor wants to appeal the order.

closure statement. The disclosure statement must be approved after notice and a hearing, by the bankruptcy court as containing adequate information. "Adequate information" is defined in 11 U.S.C. § 1125(a) as being "information of a kind, and in sufficient detail, . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan."

Appellants assert that "adequate information" was not contained in the Disclosure Statement sent to their creditors. We disagree. The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court. *In re Brandon Mill Farms, Ltd.*, 37 B.R. 190 (Bankr. N.D. Ga.1984); *In re Stanley Hotel, Inc.*, 13 B.R. 926 (Bankr. D. Co. 1981). We find no abuse of discretion in the bankruptcy court's approval of the Disclosure Statement.

While we acknowledge that the importance of the valuation and settlement of the various lawsuits between appellants and Lockheed to the Plan was not emphasized in the Disclosure Statement, we find that the bankruptcy court did not abuse its discretion in holding that the Disclosure Statement nevertheless was adequate to enable a reasonable creditor to make an informed judgment about the Plan. The existence of the various lawsuits was duly noted in the Disclosure Statement, and a concise description of each suit was made. We cannot say that a reasonable creditor did not have adequate information to realize the importance of the settlement of the lawsuits to the Plan without being told this in so many words. We also cannot accept appellants' claim that a professional evalu-

ation of the litigation was essential to making the Disclosure Statement adequate. *See In re Werth,* 29 B.R. 220 (Bankr. D. Co. 1983); *In re Stanley Hotel, supra.* Finally, we find that the lack of any discussion of equitable subordination of the Lockheed claims did not undermine the adequacy of the Disclosure Statement. At no time prior to the approval of the Disclosure Statement or at any time since then has any party brought an action against Lockheed for equitable subordination of its claims against the debtors. The mere conjecture that the claims of a creditor might be subject to equitable subordination is not the type of information that is required in a disclosure statement to provide "adequate information" to a creditor. In light of the absence of any action taken by Texas Extrusion's Bankruptcy Trustee or Creditors' Committee to pursue equitable subordination of the Lockheed claims, any statement in the Disclosure Statement explaining this concept was unnecessary.

IV. *Confirmation of the Joint Plan of Reorganization*

The debtors allege the bankruptcy court made various errors in approving the settlement of the debtors' lawsuits against Lockheed in the confirmation of the Joint Plan of Reorganization. They claim that the court erred in failing to consider their additional causes of action in the amended complaints, including the antitrust claims, in valuing their lawsuits against Lockheed. They further assert that the court relied primarily on the conclusions of Trustee Stewart in valuing the corporate lawsuit, that the court relied on a "spurious" "expert" opinion in giving the individual lawsuit a negligible settlement value, and that the court disregarded the claims of Pickens Industries against Lockheed. Debtors also claim the bankruptcy

court totally ignored conclusive and unrebutted evidence that the Plan was proposed in violation of federal antitrust laws.

The antitrust claims of the various debtors against Lockheed were first articulated in the amended corporate complaint submitted to the bankruptcy court and in the amended individual complaint submitted to the district court. Both these amended complaints were submitted only a few days before the beginning of the confirmation hearing on the Joint Plan of Reorganization. This was nearly two years after the original corporate complaint was filed and well after Lockheed's answer was served on the debtors' counsel. Neither the bankruptcy court nor the district court expressly ruled on the motions to file these amended complaints. But the fact that the bankruptcy court did not consider these claims and these two lawsuits were dismissed by the two courts without granting the motions to amend, in essence, constituted denials of the motions to amend the two complaints.

[8-10] Although leave to amend pleadings must be freely granted when justice so requires, denial of the opportunity to amend a complaint is within the discretion of the trial court after responsive pleadings have been served. Fed. R. Civ. P. 15(a). *In re Westec Corp.*, 434 F.2d 195 (5th Cir. 1970). Under the facts of this case, we hold that the bankruptcy court and the district court did not abuse their discretion in denying the debtors' motions to amend their complaints. The delay in the filing of the amended complaints, the prejudice to the opposing parties, and the existence of the ongoing bankruptcy proceedings all support the denials of these motions to amend. *Ross v. Houston Independent School District,*

699 F.2d 218 (5th Cir. 1983); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157 (5th Cir. 1982), *cert. denied*, 464 U.S. 814, 104 S. Ct. 69, 78 L.Ed.2d 83 (1983); *Jackson v. Columbus Dodge, Inc.*, 676 F.2d 120 (5th Cir. 1982);. As a result, the bankruptcy court did not err in not addressing the antitrust claims and other additional claims contained in the amended complaints in considering the value of debtors' lawsuits against Lockheed.

[11] The next challenge of the debtors to the bankruptcy court's confirmation of the Plan is that the valuation of the corporate lawsuit by the court was based primarily upon the opinion of Texas Extrusion Trustee Stewart and is otherwise unsupported by the record. The record does not confirm this charge. The bankruptcy court heard testimony from several other experts on the value of the corporate lawsuit. Also, the debtors called three attorneys, Mr. Boyd, Mr. Hytken, and Mr. Sheldon, who testified as to the value of the lawsuit.[22] In addition to the testimony of Trustee Stewart, who was an attorney actively involved in the Texas Extrusion bankruptcy proceeding, the proponents of the Plan called Mr. Price, an attorney from Trustee Stewart's law firm whom Mr. Stewart had earlier consulted in valuing the corporate lawsuit. The court also heard the testimony of Richard Pickens and had the benefit of examining numerous exhibits submitted by the parties. The bankruptcy judge

22. Mr. Boyd and Mr. Hytken were both consulted by Mr. Lippe a few weeks prior to their testimony at the confirmation hearing. They both testified that they had spent only 10-20 hours reviewing the case and had only seen a small number of the relevant documents. Mr. Sheldon had previously represented the debtors in their suits against Lockheed but had withdrawn a few weeks prior to the confirmation hearing when the debtors retained Mr. Lippe.

heard from these witnesses a range of numbers for the settlement value of the corporate lawsuit and its probability of success. The bankruptcy judge had discretion in determining the credibility of these witnesses and their ability to derive realistic figures for the settlement value of the lawsuit.

[12] We will not disturb the bankruptcy court's approval of the settlement of this lawsuit contained in the plan of reorganization absent an abuse of discretion by the court. *Matter of Aweco, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 880, 105 S. Ct. 244, 83 L.Ed.2d 182 (1984); *Matter of Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980). We find no such abuse of discretion in this case. The bankruptcy court appears to have reached an "intelligent, objective and educated evaluation" of the settlement value of the corporate lawsuit against a "sufficient factual background." *Matter of Aweco*, 725 F.2d at 299; *Matter of Jackson Brewing*, 624 F.2d at 602. *See also Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S. Ct. 1157, 20 L.Ed.2d 1 (1968). It must be remembered that the evaluation of any lawsuit is quite problematic and calls for a significant degree of speculation. The lawsuits in the case at bar were even more difficult to assess because of the minimal discovery undertaken by the debtors. Several factors cast doubt upon the debtors' claims against Lockheed, including the stated waiver in the 1981 contract, the extent to which Texas Extrusion was actually dependent on the Lockheed contract, whether the contract required that Texas Extrusion do business only with Lockheed, and the accuracy of Texas Extrusion's projected profits under the Lockheed contract. Under these circumstances we

cannot say that the bankruptcy court abused its discretion in confirming a plan which contained a settlement worth approximately $7.0 million to the four debtors.

[13] Although there was some time pressure on the bankruptcy court to approve the settlement and the Plan in general, such pressure is not uncommon in bankruptcy proceedings and does not appear to have unduly influenced the bankruptcy court's determination in this case. *Cf. Matter of Aweco,* 725 F.2d at 299. Finally, both the Bankruptcy Trustee for Texas Extrusion (Stewart) and the chairman of Texas Extrusion Creditors' Committee, expressing the Committee's position, approved the settlement of the lawsuit proposed in the Plan. It must be remembered that in the bankruptcy context, the interests of creditors not the debtors are paramount. Under these circumstances, we conclude that the requirements of 11 U.S.C. § 1129(a)(7) were met.[23]

[14] We similarly find no abuse of discretion by the bankruptcy court in giving only nominal value to the individual lawsuit of Richard and Louise Pickens in the § 1129(a)(7) liquidation analyses of their estates. The court heard expert testimony by both sides during the confirmation hearing regarding the settlement value of this lawsuit. Our review of the records finds adequate

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23. The unsecured creditors of Texas Extrusion did not receive the full value of their claims under the Plan and thus were impaired. Because several of these impaired unsecured creditors voted against the Plan, the Bankruptcy Court was required to determine whether those creditors would receive no less under the Plan than through a liquidation of the company's assets. 11 U.S.C. § 1129(a)(7). The major asset for which a liquidation valuation had to be made was the corporate lawsuit. The evaluation of the settlement value of the corporate lawsuit was therefore made in the context of a § 1129 (a)(7) liquidation analysis. A similar liquidation analysis under § 1129(a)(7) was performed for the three other estates.

support for the bankruptcy court's attaching a negligible settlement value on this lawsuit for § 1129(a)(7) purposes.

[15] We find no merit at all in the debtors' claim that the bankruptcy court erred in disregarding Pickens Industries' claims against Lockheed in confirming the Plan. The bankruptcy court conducted a proper § 1129(a)(7) analysis for Pickens Industries and in no way erred in ignoring Pickens Industries' alleged claims in the corporate suit in which it was not even a named party.[24]

[16] Further, the approval by the bankruptcy court of the payment of $882,601 to the Richard Pickens estate by Cressona was not error. This payment was for the real estate and improvements owned by Mr. Pickens and sold to Cressona pursuant to the Plan. The court heard testimony from two expert appraisers on the value of this property during the confirmation hearing, one presented by the Plan proponents and one presented by the debtors. As expected, the two experts had divergent conclusions. The bankruptcy court had the discretion to judge the credibility of these two experts and the accuracy of their appraisals. Upon a review of the record, we find there was adequate support for valuing the Richard Pickens real estate and improvements at or below $882,601 for purposes of confirming the Plan. Thus there was compliance with § 1129(a)(7) in valuing the Richard Pickens estate.

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24. Attorney Lippe filed a motion to intervene on behalf of Pickens Industries in the corporate lawsuit. Pickens Industries was also named as a plaintiff in the amended corporate and individual complaints. These actions appear to have been taken not because of any distinct damages that befell Pickens Industries from Lockheed's actions but because the Pickenses and their lawyer had lost control over the corporate lawsuit when the trustee was named for Texas Extrusion.

[17] Finally, we hold that the bankruptcy court did not err in finding that the proponents of the Plan adequately demonstrated that the Plan had been proposed "in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The good faith of a reorganization plan must be "viewed in light of the totality of the circumstances surrounding confection" of the plan. *Matter of Jasik*, 727 F.2d 1379, 1383 (5th Cir. 1984); *Public Finance Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983). The bankruptcy judge is in the best position to assess the good faith of the proposal of a plan. *Matter of Jasik*, 727 F.2d at 1383. From our review of the record, we find no error in the bankruptcy court's finding that the Plan met the requirements of 11 U.S.C. § 1129 (a)(3). The debtors' last minute claim that the reorganization plan was part and parcel of an alleged conspiracy between Lockheed and the major aluminum companies to drive Texas Extrusion out of business in violation of federal antitrust laws does not prevent the finding of validity in the Plan by the bankruptcy court. The antitrust claims of the debtors were supported only by the testimony of Richard Pickens and possibly a few internal Lockheed documents. The bankruptcy court had the discretion of discounting Mr. Pickens' testimony and attaching a nonsinister meaning to the ambiguous Lockheed documents.

## V. *Procedural Issues*

### A. Shortening of Louise Pickens' Period for Filing a Plan and Application of the Disclosure Statement to Her Estate

[18] Louise Pickens filed her bankruptcy petition under Chapter 11 on November 21, 1983. On January 13,

1984, at the close of the hearing on the disclosure statement relating to the Texas Extrusion, Pickens Industries, and Richard Pickens estates, Lockheed moved to reduce Louise Pickens' exclusive time to file her plan of reorganization from the 120-day period established by 11 U.S.C. § 1121(b).[25] The court granted this relief on January 24, 1984, giving Mrs. Pickens until 5:00 p.m. that day to file a plan of reorganization. Mrs. Pickens did not file a plan. Her estate was subsequently included in the joint plan of reorganization previously drawn up for Texas Extrusion, Pickens Industries, and Richard Pickens. The disclosure statement applicable to these three other debtors was applied to her estate also.

At the time of these proceedings, 11 U.S.C. § 1121(d) read: "On request of a party in interest and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section." Louise Pickens asserts that there was not "good cause" for reducing her exclusive 120-day period to file a reorganization plan. A review of the record, however, discloses that there was sufficient cause. The filing of Louise Pickens' bankruptcy petition appears to have been an afterthought by her attorneys, who were the same attorneys that represented Texas Extrusion, Pickens Industries, and her husband Richard. The bankruptcy court could draw the inference that the tardy filing, nearly a year after her husband's filing, had as a major purpose the delay of the creditors' efforts at reorganization in the three other related bankruptcy pro-

25. 11 U.S.C. § 1121(b) reads:
Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

ceedings. Much of Louise Pickens' personal property was community property and had already been involved in her husband's bankruptcy proceedings.

The individual lawsuit against Lockheed, filed on November 15, 1983, one week prior to Mrs. Pickens' bankruptcy filing, named both Mr. and Mrs. Pickens as plaintiffs and thus was part of Richard Pickens' bankruptcy estate also. We find no error in the bankruptcy court's reducing Louise Pickens' exclusive 120-day period to file a reorganization plan under the circumstances of this case. *See In re Crescent Beach Inn, Inc.*, 22 B.R. 155 (Bankr. D. Me. 1982); H.R. Rep. No. 595, 95th Cong., 1st Sess. at 406 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6362 ("Cause might include an unusually large or unusually small case, delay by the debtor, or recalcitrance among creditors.")

[19] Louise Pickens also asserts that she was deprived of property without due process because the disclosure statement approved for the other three estates was retroactively applied to her estate without prior notice and hearing. We find no merit in this claim. Mrs. Pickens made nothing more than conclusory allegations regarding *what* the property was of which she was deprived by the application of the disclosure statement and *how* the application of the disclosure statement did this. Modifying the disclosure statement to include Mrs. Pickens' estate did not amount to a deprivation of her property without due process of law.

B. Reconversion of Louise Pickens' Case from a Chapter 7 Proceeding to a Chapter 11 Proceeding

On February 15, 1984, one week prior to the date the confirmation hearing was scheduled to commence,

Louise Pickens moved to convert her case to a Chapter 7 liquidation proceeding. On February 21, 1984, Lockheed filed a motion to reconvert her case back to a Chapter 11 proceeding. The bankruptcy court granted Lockheed's motion on February 22, 1984, at the beginning of the confirmation hearing, over Mrs. Pickens' objection. Mrs. Pickens argues now that she was deprived of proper notice, evidence, and a hearing prior to the reconversion of her case back to a Chapter 11 proceeding.

[20, 21] A debtor has the absolute right to convert his or her Chapter 11 case to a Chapter 7 case, 11 U.S.C. § 1112(a), but does not have the right ot keep the case in Chapter 7. 5 Collier on Bankruptcy ¶ 1112.03 (1979). 11 U.S.C. § 706(b) allows a bankruptcy court to convert a case under Chapter 7 to Chapter 11 upon the request of a party in interest after notice and a hearing. These decisions to convert are within the discretionary powers of the bankruptcy court based on the court's determination of what will most inure to the benefit of all parties in interest. H.R. Rep. No. 595, 95 Cong., 1st Sess. at 380 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6336; *In re Graham*, 21 B.R. 235, 237 (Bankr. N.D. Iowa W.D. 1982). We find no abuse of discretion by the bankruptcy court in reconverting Louise Pickens' case from Chapter 7 back to Chapter 11.

The motives of Louise Pickens' counsel in filing her motion to convert her case to a Chapter 7 liquidation one week prior to the confirmation hearing are questionable at best. The bankruptcy court was not unreasonable in finding the primary purpose of the conversion was to interfere with or impede the Chapter 11 reorganization of all four of the debtors. In addition, the same lawyers represented three of the four debtors and were fully

conversant with all the facts of the case. Under these circumstances, the one day notice regarding reconversion does not appear to have been unreasonable. The Bankruptcy Code is flexible in allowing the bankruptcy court to fashion notice that is "appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A). Finally, Louise Pickens did have a hearing on this issue at the beginning of the confirmation hearing. Overall, a review of the record convinces us that the bankruptcy court was properly exercising its discretion in reconverting Louise Pickens' case back to Chapter 11 and that Mrs. Pickens was not deprived of her due process rights by this action.

C. Alleged Substantive Consolidation of the Four Estates

Appellants argue next that the operation of the Plan caused, in effect, substantive consolidation of the four separate bankruptcy estates without meeting the standards for substantive consolidation. Appellants allege that in this case assets belonging to one estate were improperly used to pay debts of the other estates. *See Matter of Walsh Construction, Inc.*, 669 F.2d 1325 (9th Cir. 1982). Appellants assert three specific examples.

[22] First, appellants argue that proceeds from the sale under the Plan of assets from the Texas Extrusion and Richard Pickens estates to Cressona Aluminum were used to pay debts of all four estates. Appellants claim $135,000 of the proceeds from the sale to Cressona were used to pay the administrative fees of all four estates. Appellants in this claim are misinterpreting the mechanics of the Plan. Under the Plan, the proceeds from the sale of assets belonging to the Texas Extrusion and Richard

Pickens estates remaining after the senior real estate lienholders were paid off were paid over to Lockheed because Lockheed also had liens on all these assets. As part of the settlement of the lawsuits between Lockheed and the various debtors, Lockheed used these proceeds to pay off the various administrative expenses of the four estates. These proceeds were the property of Lockheed and no longer were identifiable with any one of the four estates when used to pay these administrative expenses. Lockheed was free to spend this particular money as it saw fit. Lockheed merely had the obligation to pay the administrative expenses of all four debtors out of its treasury as a partial exchange for the releases of what Lockheed asserted were worthless lawsuits. This agreed payment by Lockheed did not bring about a consolidation of the four estates.

Second, appellants allege that Lockheed improperly used $522.68 from the proceeds of the sale of the Texas Extrusion and Richard Pickens assets to pay the unsecured credit card claims in the Louise Pickens case. Under the same analysis as that stated above, we find there was no substantive consolidation by this payment. Once again, this $522.68 belonged to Lockheed, which in turn paid the same sum as a partial settlement with the Louise Pickens estate.

[23] Third, appellants allege that a $1600 tax claim against the Louise Pickens estate was improperly paid with funds previously paid to the Richard Pickens estate. As best can be determined from the Plan and the record, Louise Pickens appears to have had a valid community property claim under Texas law in the money paid by Lockheed to the Richard Pickens estate pursuant to the

Plan and thus a portion of these funds could be used to pay off tax claims of the Louise Pickens estate without bringing about a substantive consolidation. *See* Tex. Fam. Code Ann. § 5.61(c).

[24] In addition to these specific alleged claims of improper consolidation, appellants assert that various statements and actions by Lockheed and its attorneys constituted admission of substantive consolidation and that the Plan in general treated the four estates as being consolidated. Our review of the record, however, convinces us there is no merit to these contentions. These statements, actions, and impressions were merely evidence of the complications arising when four separate estates are disposed of in a single plan of reorganization. We find no substantive consolidation of the four estates.

D. Allowance and Disallowance of Votes

Appellants allege next that the bankruptcy court arbitrarily and in a nonevenhanded fashion accepted or rejected votes on the Plan in total disregard of 11 U.S.C. § 1126(e).[26] Our review of the record, however, reveals no violation of § 1126(e).

[25] Appellants assert that the Small Business Administration vote in favor of the Plan should not be allowed because the withdrawal of the SBA's prior vote rejecting the Plan did not comport with the procedures

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26. 11 U.S.C. § 1126(e) reads:

On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

of Bankruptcy Rule 3018.[27] The core of appellants' challenge is that the SBA vote change did not occur within the time fixed for the acceptance or rejection of the Plan. The reason why the SBA initially voted against the Plan apparently was because its claims were not adequately treated in the Plan. Louise Pickens failed to tell the Plan proponents of the SBA claim, and the SBA proof of claim against Mrs. Pickens' estate was not received until after the SBA was solicited for its vote. These circumstances appear to have been the result of including the Louise Pickens estate in the Plan at the last minute, and the delay by her lawyers in filing her schedule of assets and liabilities.

Once the Plan proponents were apprised of the SBA claim against the Louise Pickens estate, a minor modification was made to the Plan to settle the SBA claim with a transfer to the SBA of two acres of real estate in Rockwall, Texas, that Mrs. Pickens originally was going to keep. No other creditors in the Louise Pickens estate except Lockheed were affected by this modification since the claims of all of Mrs. Pickens' creditors except for Lockheed's were paid in full. Under the facts of this case we find no error in the bankruptcy court's allowing the SBA to withdraw its rejection of the Plan and vote for the Plan. *See In re Jartran, Inc.*, 44 B.R. 331, 363 (Bankr. N.D. Ill., E.D. 1984). *See* also Bankruptcy Rule 3019. To allow this kind of self serving objection to upset resolution of a complicated bankruptcy would

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27. Bankruptcy Rule 3018(a) reads in part:
For cause shown and within the time fixed for acceptance or rejection of a plan, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection.

make a travesty of the entire bankruptcy process. This observation also applies to a number of the debtors' other picayune objections.

[26] Appellants also allege that improper discussions occurred between the attorney for the Creditors' Committee and ALCOMIJ, one of Texas Extrusion's largest unsecured creditors. Appellants allege that the Committee's counsel proposed that if ALCOMIJ voted to accept the Plan, the Committee would attempt to settle ALCOMIJ's claim, which was a matter of some dispute. A review of the record convinces us that nothing improper occurred through these discussions. A representative of a creditors' committee is authorized to consult with those creditors represented by the committee and to apprise those creditors of the committee's recommendations as to a plan of reorganization. 11 U.S.C. § 1103(c)(3). This authorization logically includes plans by a committee to file future objections as to some of the unsecured claims or to settle such claims. The record discloses no "deals" between the Committee's counsel and ALCOMIJ to secure ALCOMIJ's approval of the Plan in this case. We find no error in the bankruptcy court's failure to take action under 11 U.S.C. § 1126(e) regarding this matter.

[27] Appellants also claim that language on the opening page of the Plan confused a number of creditors into thinking that some of the debtors were joining in and proposing the Plan. Richard Pickens testified at the confirmation hearing that a number of people had called him indicating that this had been their impression. Our review of the record convinces us that a complete reading of the Plan, the Disclosure Statement, and the cover letter accompanying the solicitation materials would ade-

quately dispel any such confusion. We find no error in the bankruptcy court's decision not to take action under 11 U.S.C. § 1126(e) on this matter.

[28] Finally, appellants appear to claim the bankruptcy court acted improperly, or at least in an unevenhanded manner, in not counting the votes on the Plan that the court thought may have been improperly solicited by the appellants. We find no error in the court's ruling that all the ballots sent to the bankruptcy clerk's office, as per the instructions given by the appellants in their unauthorized solicitation, not be counted. Ballots were supposed to have been sent to the offices of Thompson & Knight according to the instructions in the authorized solicitation materials sent to the creditors. The bankruptcy court was acting within its discretion under 11 U.S.C. § 1126(e) in not counting the ballots sent to the bankruptcy clerk instead of to Thompson & Knight. We find no unevenhanded application of 11 U.S.C. § 1126 (e) in this matter.

E. The Bankruptcy Court's Written Findings of Fact and Conclusions of Law

[29] Appellants assert that the written findings of fact and conclusions of law drastically altered the prior verbal findings made by the bankruptcy court and were signed following extensive discussions between the bankruptcy court and Lockheed's counsel. Appellants allege this conduct was in direct violation of Bankruptcy Rule 9003, the Texas Code of Professional Responsibility, and the Texas Code of Judicial Conduct.

Although we have held that the practice of trial judges permitting counsel for a prevailing side to draft the find-

ings of fact and conclusions of law should be discouraged, the practice continues and has not been prohibited. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), *cert denied*, 449 U.S. 899, 101 S. Ct. 268, 66 L.Ed.2d 129 (1980). *See also, Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985).

The bankruptcy rule and the provisions of the Texas Code of Professional Responsibility and Texas Code of Judicial Conduct cited by appellants do not prohibit such conduct because these provisions refer to communication concerning matters pending before the bankruptcy judge. In the case at bar, the bankruptcy judge had already verbally ruled that he was confirming the Plan. The matter was no longer pending for purposes of these provisions prohibiting ex parte contacts between counsel for a party and a judge in whose court that party's case is pending. *See In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987). *Cf. In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D. Ill. 1985).

[30] Under Bankruptcy Rule 8013, findings of fact made by a bankruptcy judge are not to be set aside unless clearly erroneous. Upon our review of the record, we do no find that these findings are clearly erroneous since we are not left with the definite and firm conviction that a mistake has been committed. *Amstar Corp. v. Domino's Pizza, supra; Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 434 (5th Cir. 1977). The bankruptcy judge took an active role in the preparation of the findings in reviewing the four drafts submitted to the court. The court had also previously made lengthy oral findings of fact to support confirmation. Furthermore,

the bankruptcy judge conducted a hearing concerning the findings, and appellants' objections to the findings were vigorously presented at that hearing. *See Professional Golfers Association v. Bankers Life & Casualty Co.*, 514 F.2d 665, 672 (5th Cir. 1975). Although the written findings obviously do not contain all the facts that appellants wish were there and do contain others that appellants would just as soon forget, we are not left with the conclusion that the findings are illogical or implausible. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. at 577, 105 S. Ct. at 1513; *Geyen v. Marsh*, 775 F.2d 1303, 1310 (5th Cir. 1985). The fact that the written findings are in some ways different from the oral findings previously made by the court is not determinative. Oral findings and conclusions are always subject to revision as the bankruptcy court explained in this case. *See Professional Golfers Association*, 514 F.2d at 672.

F. Application of 11 U.S.C. § 363

[31] Appellants assert that the references in the bankruptcy court Order Confirming Plan to 11 U.S.C. § 363 were improper and that the applicability of this statute had never been mentioned before in the disclosure statement or at the confirmation hearing. The Order Confirming Plan specified that Texas Extrusion and Richard Pickens, or their respective bankruptcy trustees, sell various property to Cressona Aluminum pursuant to 11 U.S.C. § 363. Appellants allege that the references to § 363 were at the request of Lockheed in order to prevent appellants from unwinding the sale to Cressona in the event of a reversal of the confirmation of the Plan on

appeal.[28] Evidently this was a condition demanded by Cressona before it would agree to purchase this property.

We have some doubt as to whether the application of 11 U.S.C. § 363 was proper in this case, especially with regard to Richard Pickens. Section 363 is a part of the Bankruptcy Code dealing with administrative powers. Sections 363(b) and (c) referred to in § 363(m) deal with the authority of a bankruptcy trustee to use, sell, or lease property of the estate. There is a definite implication that these provisions concern the trustee's authority during the administration of the estate and not at the final disposition of the property of the estate pursuant to a plan of reorganization. Furthermore, we have some doubt as to whether a court can order a debtor-in-possession, like Richard Pickens, to sell property under 11 U.S.C. § 363. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 n. 10 (5th Cir. 1985); *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983).

We, however, decline at this time to rule on the propriety of the application of 11 U.S.C. § 363 to the sale of property pursuant to a plan of reorganization. Such a sale is clearly envisioned in a Chapter 11 reorganization. *See* 11 U.S.C. §§ 1123, 1141, 1142. It is not necessary for us to decide whether the sale can be carried out pursuant to the authority in 11 U.S.C. § 363, thus in-

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28. This protection is afforded by 11 U.S.C. § 363(m):

(m) The reversal or modification on appeal of an authorization under subsection (b) and (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

voking the shield of 11 U.S.C. § 363(m). Since we are not reversing the confirmation of the Plan the issue of whether the sale to Cressona can be unwound contrary to § 363(m) is of no relevance.

G. Constitutional Power of the Bankruptcy Court to Confirm the Plan

[32] Appellants assert that the holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982), invalidates the actions of the bankruptcy court in this case in confirming a reorganization plan whose major component is the valuation and settlement of several lawsuits based largely on state causes of action. One of these lawsuits, the corporate lawsuit, was pending in the bankruptcy court when the Plan was confirmed and was an asset of the Texas Extrusion estate and under the control of Trustee Stewart. This suit earlier had been referred to the bankruptcy court by the district court. The other lawsuit, the individual suit, was pending in the federal district court and was an asset of both the Pickenses' estates. The valuation of the assets of a debtor in bankruptcy, including causes of action held by the debtor, is an integral part of the confirmation process under Chapter 11. The settlement of causes of action in a plan of reorganization is expressly authorized under the Bankruptcy Code. 11 U.S.C. § 1123(b)(3). Under the Emergency Rule in effect at the time of these proceedings, the bankruptcy court retained the authority to confirm plans of reorganization. We find the bankruptcy court did have constitutional authority to confirm this plan of reorganization.

## VI. *Conclusion*

[33] After a thorough review of the record, we find no basis upon which to upset the district court's affirmation of the bankruptcy court's confirmation of the joint plan of reorganization involving these four appellants. Nor do we see a basis upon which to grant any of the various other forms of relief requested by appellants.[29] While we agree with appellants that some errors may have been made by the bankruptcy court, including the use of Bankruptcy Rule 7070 and 11 U.S.C. § 363 in the proceedings, none of these errors prejudiced appellants in any significant way. Overall, in this bankruptcy proceeding, the appellants received a fair hearing and their claims were given full consideration.

AFFIRMED.

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29. One of the appellants' additional requests for relief was a motion to strike portions of Lockheed's brief to this Court and portions of Lockheed's record excerpts submitted along with its brief. Appellants claim that Lockheed incorporated by reference portions of its briefs filed in the district court in the appeal to that court in its brief to this Court thereby getting around the 75 page limit imposed by this Court. We deny the motion to strike for the simple fact that although Lockheed's counsel's actions may have been a circumvention of the rule, the material referred to in the Lockheed brief was already present in the record before us. We are under no obligation to act on such an asserted violation and we perceive no point in doing so in this case. *Neeley v. Bankers Trust Company of Texas*, 757 F.2d 621, 634 n. 18 (5th Cir. 1985).

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-1326, 84-1387, 87-1075, 84-1449,
87-1077, 87-1074, and 87-1076

(Filed June 7, 1988)

In the Matter of TEXAS EXTRUSION CORP., Debtor.
TEXAS EXTRUSION CORP.,
Plaintiff-Appellant,

v.

LOCKHEED CORP., and Lockheed Finance Corp., et al.,
Defendants-Appellees.

In the Matter of Richard W. PICKENS, Debtor.
Richard W. PICKENS, et al., d/b/a Gold Sun Aluminum Inc.,
Plaintiffs-Appellants,

v.

LOCKHEED CORP., Daniel C. Stewart, Trustee of Texas Extrusion Corp. & Disbursing Agent, the Official Creditors Committee of Texas Ex trusion Corp., Lockheed Finance Corp., and Lockheed California Co., et al., Defendants-Appellees.

In the Matter of PICKENS INDUSTRIES, INC.,
Debtor.

PICKENS INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

LOCKHEED CORPORATION, et al.,
Defendants-Appellees.

In the Matter of Louise
PICKENS, Debtor
Louise PICKENS d/b/a Gold Sun
Aluminum, Inc., Plaintiff-Appellant,

v.

LOCKHEED CORPORATION, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

( June 7, 1988 )

Before WILLIAMS, HIGGINBOTHAM, Circuit Judges,
and SANDERS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

By: /s/ J. S. WILLIAMS
United States Circuit Judge

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* District Judge of the Northern District of Texas, sitting by designation.

## APPENDIX C

UNITED STATES COURT OF APPEALS

No. 87-1074

D.C. Docket No. CA-3-84-1058-F

IN THE MATTER OF: PICKENS INDUSTRIES, INC., Debtor.

PICKENS INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

LOCKHEED CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before WILLIAMS and HIGGINBOTHAM, Circuit Judges, and SANDERS*, District Judge.

### JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

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* District Judge of the Northern District of Texas, sitting by designation.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

May 12, 1988

ISSUED AS MANDATE: June 17, 1988

## APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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CASE NO. 382-00387-F

IN RE:

TEXAS EXTRUSION CORPORATION,
DEBTOR.

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CASE NO. 382-00386-F

IN RE:

PICKENS INDUSTRIES, INCORPORATED,
DEBTOR.

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CASE NO. 383-00008-F

IN RE:

RICHARD W. PICKENS, d/b/a
GOLD SUN ALUMINUM, INC.
DEBTOR.

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CASE NO. 383-01542-F
LOUISE PICKENS,
DEBTOR.

# FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CONNECTION WITH CONFIRMATION OF SECOND AMENDED JOINT PLAN OF REORGANIZATION

On February 22, 1984, this Court commenced a hearing on the confirmation of the Second Amended Joint Plan of Reorganization (the "Plan") in the above styled and numbered proceedings pursuant to the provisions of 11 U.S.C. § 1128. Any terms used herein which are not specifically defined shall have the meanings assigned to them in the Plan unless the context clearly indicates otherwise. This Court, conducted four full days of hearings regarding confirmation of the Plan and heard testimony from over fourteen witnesses and had the opportunity to evaluate their credibility, and, upon a review of the contents of the Plan, the contents of the First Amended Disclosure Statement previously approved by the Court pursuant to the provisions of 11 U.S.C. § 1125(b), the evidentiary materials submitted herein, the exhibits and other admitted documents herein, the testimony of witnesses, arguments and statements of counsel and other relevant material in the record of these cases and all other matters in consideration at this hearing, hereby makes the following findings of fact and conclusions of law:

## I. FINDINGS OF FACT

### BACKGROUND

A. *Filing of Bankruptcies*

On March 24, 1982, Texas Extrusion Corporation, a Texas corporation, filed its voluntary petition for reor-

ganization under Chapter 11 of the Bankruptcy Code, Case No. 382-00387-F, (the "Texas Extrusion Case") and continued as debtor-in-possession pursuant to the provisions of 11 U.S.C. § 1107 until October 31, 1983.

On March 24, 1982, Pickens Industries Incorporated a Texas corporation and owner of 100% of the stock of Texas Extrusion corporation, filed its voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, Case No. 382-00386-F, (the "PII Case") and has continued in possession and control of its sole asset, the stock of Texas Extrusion Corporation, as debtor in possession pursuant to the provisions of 11 U.S.C. § 1107.

On January 3, 1983, Richard W. Pickens, a major shareholder in Pickens Industries Incorporated, filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, Case No. 383-00008-F, (the "Richard Pickens Case") and has continued in possession and control of his assets as debtor in possession pursuant to the provisions of 11 U.S.C. § 1107.

On November 21, 1983, Louise Pickens, a major shareholder in Pickens Industries, Incorporated, filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, Case No. 383-01542-F, (the "Louise Pickens Case") and has continued in possession and control of her assets as debtor in possession pursuant to the provisions of 11 U.S.C. § 1107.

In April, 1982, the United States Trustee's Office held an organizational meeting of the unsecured creditors of Texas Extrusion Corporation and appointed an Official Creditors' Committee pursuant to the provisions of 11 U.S.C. § 1102. On April 26, 1982, this Court signed

its order authorizing the Official Creditors' Committee to retain as its counsel the law firm of Gardere & Wynne.

B. *Filing of Lawsuits*

On or about March 26, 1982, Texas Extrusion Corporation as debtor in possession filed a lawsuit against Lockheed Corporation ("Lockheed") and Lockheed Finance Corporation seeking actual damages in the amount of $40,000,000 plus punitive damages in the amount of $80,000,000 because of Lockheed's alleged breach of a supply agreement. The lawsuit is styled *Texas Extrusion Corporation v. Lockheed Corporation and Lockheed Finance Corporation,* CA-3-82-1350-F (the "corporate lawsuit").

On or about November 15, 1983, litigation styled *Richard W. Pickens and Louise R. Pickens v. Lockheed Corporation, Lockheed Finance Corporation and Lockheed California Corporation,* CA-3-83-1905-F (the "personal lawsuit"), alleging personal damages resulting from Lockheed's alleged breach of a supply agreement with Texas Extrusion Corporation was initiated by Mr. Pickens as debtor in possession and Mrs. Pickens.

C. *Appointment of Trustee*

On September 9, 1983, the United States Trustee and the Official Creditors' Committee filed with this Court an application for the appointment of a trustee to take control of the Texas Extrusion Corporation assets pursuant to the provisions of 11 U.S.C. § 1104 due to the accumulation of substantial unpaid post-petition liabilities including, but not limited to, unpaid federal withholding taxes in excess of $200,000.00. Pursuant to said appli-

cation, on October 28, 1983, this Court granted the application of the U.S. Trustee for appointment of a trustee. Then on October 31, 1983, the U.S. Trustee, pursuant to 11 U.S.C. § 151104 appointed Daniel Stewart, Esquire, as Trustee over the assets of Texas Extrusion Corporation.

On November 21, 1983, this Court was informed by Daniel Stewart, Trustee, that unless Texas Extrusion Corporation received a substantial infusion of new capital it could not be operated at a profit and it would continue to incur additional unpaid post-petition liabilities. Accordingly, this Court authorized the cessation of operations of Texas Extrusion Corporation.

D. *Submission of A Plan*

On November 23, 1983, almost two years after the filing of the Texas Extrusion Case, and with the debtor in possession unwilling or unable to submit a plan of reorganization, Lockheed, the largest secured creditor of each of the Debtors and the Official Creditors' Committee of Texas Extrusion Corporation, filed a joint plan of reorganization dealing with each of the four cases separately. The plan was subsequently amended by the proponents and was ultimately entitled the Second Amended Joint Plan of Reorganization (the "Plan") and described in the First Amended Disclosure Statement.

## THE PLAN AS PROPOSED

The Plan filed herein by the Official Creditors' Committee of Texas Extrusion Corporation and Lockheed, in essence provides for the following:

A. *The Texas Extrusion Case*

(1) *Classes of Creditors.*

The following classes of creditors were established:

a. TE Class 1: All allowed claims arising under Section 507(a)(1)-(5) of the Code, as the same are allowed, approved and ordered paid by the court except post-petition claims.

b. TE Class 2: All post-petition claims except post petition tax claims.

c. TE Class 3: All pre-petition and post-petition FICA and withholding taxes and state unemployment and franchise taxes and state and local ad valorem taxes.

d. TE Class 4: Lockheed claims in the amount of $7,140,000.

e. TE Class 5: All allowed claims of the Citizens State Bank of Princeton, Texas.

f. TE Class 6: All allowed claims of the Associates Commercial Corporation.

g. TE Class 7: All allowed claims of the Tandy Corporation.

h. TE Class 8: Unsecured claims totaling approximately $4,300,000.

i. TE Class 9: All allowed claims of TE equity security holders.

(2) *Mechanics of the Plan.*

a. The Plan provides for the sale of substantially all of the assets of Texas Extrusion Corporation

(basically machinery and equipment) to Cressona Aluminum Company ("Cressona") for the sum of $1,550,000.00. Said sum will be paid to Lockheed pursuant to its first lien on those assets.

b. In consideration for Lockheed Corporation's agreement to: (1) pay the sum of $1,227,100.00 for pre-petition claims, (2) pay the sum of $135,000.00 for administrative claims in all four bankruptcy cases (the major portion of such sum being paid in the Texas Extrusion Case), (3) waiving its deficiency unsecured claim of approximately $5,590,000.00, and (4) waiving its rights to $99,200.00 of post-petition priority accrued rentals due from Texas Extrusion Corporation on certain Pickens real estate (which sum will be paid to the Richard Pickens bankruptcy estate) Lockheed Corporation will receive a release of all claims and causes of action possessed by Texas Extrusion Corporation against Lockheed and a dismissal with prejudice of the corporate lawsuit, and Lockheed will release Texas Extrusion Corporation from all claims and causes of action possessed by Lockheed and will dismiss with prejudice its lawsuit on the personal guaranties of Richard W. and Louise R. Pickens.

(3) *Treatment of Classes of Creditors.*

Under the Plan, the claims of TE Classes 1, 2, 3, 5, 6, and 7 will be paid in full. Lockheed, TE Class 4, will receive $1,550,000.00 on its claim of $7,140,000.00. Each unsecured claimant of Texas Extrusion, TE Class 8, shall receive a pro rata share of $475,000.00 as payment claim against Texas Extrusion Corporation. The equity security holders of Texas Extrusion Corporation, TE Class 9, will retain their stock in Texas Extrusion Corporation.

B.. *The PII Case*

(1) *Classes of Creditors.*

The following classes of creditors were established:

a. PII Class 1: All allowed claims arising under Sections 507(a)(1)-(5) of the Code, as the same are allowed, approved and ordered paid by the court.

b. PII Class 2: All allowed claims arising under Section 507(a)(6) of the Code.

c. PII Class 3: All Lockheed claims.

d. PII Class 4: PII unsecured claims, a single claim of Richard W. Pickens in the amount of approximately $346,979.59.

e. PII Class 5: All allowed claims of PII equity security holders.

(2) *Mechanics of the Plan.*

PII will retain ownership of all the stock of Texas Extrusion Corporation and will release all claims against Lockheed and Lockheed will release all claims against PII including its claims to such stock and the guaranty of PII on the debt of Texas Extrusion Corporation to Lockheed.

(3) *Treatment of Classes of Creditors.*

All of the claims of PII Class 1 will be paid. There are no creditors in PII Class 2. No payment will be made to Lockheed Corporation, which is PII Class 3. There will also be no payment to the unsecured claimants of PII, PII Class 4, and the PII equity security holders, will retain their stock in PII.

C. *The Richard Pickens Case*

(1) *Classes of Creditors.*

The following classes of creditors were established:

a. Pickens Class 1: All allowed claims arising under 507(a)(1)-(5) of the Code.

b. Pickens Class 2: All allowed claims arising under Section 507(a)(6) of the Code.

c. Pickens Class 3: All claims of Lockheed in the Richard Pickens case covered by the value of collateral subject to the Lockheed liens.

d. Pickens Class 4: All allowed claims of William D. Russell of 1705½ Woodhead Street, Houston, Texas 77019, and all claims of the First State Bank of Rockwall, Texas.

e. Pickens Class 5: All allowed claims of the Centennial Bank.

f. Pickens Class 6: All allowed claims of the Lakeside National Bank of Rockwall, Texas.

g. Pickens Class 7: All allowed claims of Vera Hume of 1304 Crabapple Lane, Memphis, Tennessee, 38117.

h. Pickens Class 8: All allowed claims of the University National Bank of Denver, Colorado.

i. Pickens Class 9: All allowed claims of the Padre Investment Company, Corpus Christi, Texas.

j. Pickens Class 10: Unsecured Claims, of which there are six.

(2) *Mechanics of the Plan.*

a. The Plan provides for the sale of the Pickens real estate (25 acres of land needed for operation of the Texas Extrusion plant) and all improvements (i.e., buildings) thereon, owned by Richard W. Pickens and wife Louise R. Pickens (as community property) to Cressona for the sum of $700,000.00. The sum of $404,000.00 out of the purchase price will be paid to Centennial Savings Bank which holds a first lien on said property and the balance of $296,000.00 will be paid to Lockheed pursuant to its second lien on said property securing the personal non-recourse guaranties of Richard and Louise Pickens.

b. The Plan also provides for the sale of the unimproved real estate (114 acres contiguous to the 25 acre tract) owned by Richard W. Pickens and Louise Pickens (as community property) to Cressona for the total sum of $182,600.00. The sum of $55.761.66 out of the purchase price will be paid to Vera Hume who holds a first lien on said property and the balance of $126,838.-34 will be paid to Lockheed pursuant to its second lien on said property securing the non-recourse guaranties of Richard and Louise Pickens.

c. In consideration for Lockheed's agreements as set out above in paragraph 2.b under the Texas Extrusion Case and Lockheed's further agreement to (i) waive its rights to its unsecured claim in the Richard W. Pickens bankruptcy estate in the approximate amount of $798,000.00 arising from a limited guaranty of the Texas Extrusion Corporation indebtedness to Lockheed; (ii) payment of all the unsecured claims of his wife Louise Pickens in the amount of $522.68; and (iii) payment of

all allowed post-petition administrative claims in the Richard W. Pickens bankruptcy estate, Lockheed will receive a release of all claims and causes of action possessed by Richard W. Pickens against Lockheed Corporation and a dismissal with prejudice of the individual lawsuit, and Lockheed Corporation will release Richard W. Pickens from all claims and causes of action possessed by it.

(3) *Treatment of Classes of Creditors.*

Under the Plan, the following classes of creditors in this case will be paid in full: Pickens Classes 1, 2, 5, and 7. Creditors in classes 4, 6 and 8 will receive the security for their debt.There are no creditors in Pickens Class 9. The following classes will receive partial payment, Lockheed, Class 3, and the unsecured creditors of Mr. Pickens, Class 10.

D. *The Louise Pickens Case*

(1) *Classes of Creditors.*

The following classes of creditors were established:

a. Louise Pickens Class 1: All allowed claims arising under Section 507(a)(1)-(5) of the Code.

b. Louise Pickens Class 2: All allowed claims arising under Section 507(a)(6) of the Code.

c. Louise Pickens Class 3: Scheduled unsecured claims, totalling $522.68.

(2) *Mechanics of the Plan.*

The Plan provides that in consideration of the agreements of Lockheed Corporation set out in paragraph 2.b

of the Texas Extrusion Case and 2.c of the Richard Pickens Case and Lockheed's further agreement to (i) waive its rights to its unsecured claim in the Louise Pickens bankruptcy estate in the approximate amount of $890,000 00 arising from her limited guaranty of the Texas Extrusion Corporation indebtedness to Lockheed Corporation; (ii) payment of the sum of the allowed claims of all her unsecured creditors except the Small Business Administrator in full in the approximate amount of $522.68; and (iii) payment of all allowed post-petition administrative claims in the Louise Pickens Case, Lockheed will receive a release of claims and causes of action possessed by Louise Pickens against Lockheed and a dismissal with prejudice of the individual lawsuit, and Lockheed will release Louise Pickens of all claims and causes of action possessed by it.

(3) *Treatment of Classes of Creditors.*

All three classes of creditors in the Louise Pickens Case will receive payment in full.

## THE VOTE

Following approval of the first amended disclosure statement, that disclosure statement, the plan, a ballot for accepting or rejecting the Plan, and a letter from Tim Garrison, Chairman of the official creditors' committee, was sent to each of the creditors or interest holders in the Texas Extrusion Case, the PII Case, the Richard W. Pickens Case, and the Louise R. Pickens Case. The cover letter accompanying that package instructed the recipient to return the ballot in the enclosed, stamped envelope addressed to Thompson & Knight.

On February 13, 1984, a letter was sent to various unsecured creditors in the Texas Extrusion Case, the PII Case, the Richard W. Pickens Case, and the Louise R. Pickens Case, by Richard W. Pickens. This letter was sent without notice to any of the other parties involved in the four cases and without approval of the court. The purpose of the letter was to influence creditors to oppose the Plan by changing their vote, if they had already voted, or by voting to reject the plan. The letter instructed the recipient to send an enclosed ballot to the United States Bankruptcy Court, 14th Floor, 1100 Commerce Street, Dallas, Texas 75202.

The February 13, 1984, letter of Richard W. Pickens was sent in violation of the Code, and any votes based upon that letter were not solicited or procured in good faith or in accordance with the provisions of the Code. Since all votes procured by this letter would have been sent to the United States Bankruptcy Court, the court finds that none of the ballots received by the bankruptcy court should be included in the vote tally.

The request to disallow votes received by the Bankruptcy Clerk, was made by the Official Creditors' Committee, a party in interest in the Texas Extrusion Case, and was acted upon at a hearing on February 22, 1984, in response to that request, of which the debtors in each of the four cases had notice.

The tally of votes received by Thompson & Knight for each case established the following results:

A. *The Texas Extrusion Case:*

1. Classes unimpaired and voting to accept—TE Class 2 and 3.

2. Classes unimpaired and deemed to have accepted —TE Classes 1, 5, 6, 7 and 9.

3. Classes impaired and voting to accept—TE Classes 4 and 8.

B. *The PII Case:*

1. Classes unimpaired and voting to accept—none.

2. Classes unimpaired and deemed to have accepted —PII Class 1 and Class 5.

3. Classes impaired and voting to accept—PII Class 3.

4. Classes impaired and voting to reject the plan— PII Class 4.

There were no creditors in PII Class 2.

C. *The Richard W. Pickens Case:*

1. Classes unimpaired and voting to accept—Pickens Classes 2, 4 and 7.

2. Classes unimpaired and deemed to have accepted —Pickens Classes 1, 5, 6, and 8.

3. Classes impaired and voting to accept—Pickens Class 3.

4. Classes impaired and voting to reject—Pickens Class 10.

D. *The Louise R. Pickens Case:*

1. Classes unimpaired and deemed to have accepted —Louise Pickens Classes 1, 2, and 3.

Based on the vote tally, under Section 1129 of the Code, PII Class 4, and Pickens Class 10 did not vote to accept the Plan.

## THE HEARING AND CONFIRMATION

### A. *Procedural Matters Decided During the Confirmation Hearing*

#### 1. *The Texas Extrusion Case*

a. The attorney for the Official Creditors Committee and an attorney representing an unsecured creditor in such case requested the Court approve a compromise and settlement of the claim of Mr. J .D. Leavesly. The claim, originally in the amount of approximately $850,-000 had been filed as a lawsuit against Texas Extrusion Corporation for an allegedly defective press sold to Leavesly or his predecessor. The attorneys recited that the proposed settlement would be in the amount of $250,000 and that Mr. Leavesly on such basis had voted to approve the Plan. The Court entered an Order settling the claim for an allowed amount of $250,000 subject to it being established that Mr. Leavesly in fact owned the claim and had a right to assert it. Since Mr. Leavesly had cast his ballot for approval of the Plan with the Clerk of the Bankruptcy Court instead of in accordance with the procedures set forth in the official ballots, the vote of Mr. Leavesly was not included in the vote tally.

b. The Plan was modified to clarify the fact that the pre- and post-petition taxes to be paid in full were intended to and did, in fact, include all state unemployment and franchise taxes as well as FICA and withholding taxes and state and local ad valorem taxes.

In addition, the time for objections to and payment of all of the aforesaid tax claims was clarified by the setting of a date for such objections and payment.

2. *The Louise Pickens Case*

a. Immediately prior to the beginning of the Confirmation Hearing, Louise Pickens, the Debtor-In-Possession in the Louise Pickens Case sought to convert the case from a Chapter 11 case to a Chapter 7 case. This Court found that, while the debtor-in-possession has the right to convert the case in accordance with § 1112(a) of the Code, that the proponents have a right to seek to convert the case back to a Chapter 11 case pursuant to the provisions of § 706 upon notice and hearing. This Court ordered that the case be converted back to a Chapter 11 case pursuant to the motion therefore filed by the proponents and because the debtor-in-possession was present by attorney at the hearing and fully familiar with the Plan and no addtional notice was required. The Court heard the motion and found it was in the best interest of creditors in the case that it should be converted back to a Chapter 11 case.

b. The Plan was modified to add an additional class (Class 4) consisting of the claims of the Small Business Administration (SBA) in the Louise Pickens Case. The SBA filed a claim against Louise Pickens in the amount of approximately $393,000 subsequent to the filing of the schedules in the case and the mailing of the disclosure statement and the Plan, but prior to the bar date. Since the Plan only provided for the payment in full of the unsecured creditors listed in the Louise Pickens' schedules, the Plan was modified to provide for the transfer of title to approximately two acres (unvalued

in the Louise Pickens' schedules) to the SBA upon the consummation of the Plan, in full and final payment and satisfaction of its claim in the case. The above modifications were ordered by the Court pursuant to 11 U.S.C. § 1127(a), and such modifications were approved by this Court and were so minor that they do not require additional disclosure pursuant to 11 U.S.C. § 1125.

c. The Court also allowed the SBA to change its vote from rejection to acceptance, the Court having concluded the requirements of Rule 3018 of the Rules of Bankruptcy Procedure had been satisfied.

d. During the course of the confirmation hearing, the Proponents modified the Plan to add an additional class to the Louise Pickens Case, Louise Pickens Class 5. The only interest holder in Louise Pickens Class 5 is Louise Pickens, the debtor. This modification was ordered by the Court pursuant to 11 U.S.C. § 1127(a), and such modification was approved by this Court and was so minor that it did not require additional disclosure pursuant to 11 U.S.C. § 1125. Louise Pickens, as the Louise Pickens Class 5 interest holder, shall retain her exempt assets under the Plan.

3. *The Richard Pickens Case*

a. The Plan was modified to reflect that Lockheed, a creditor of Richard Pickens waived its unsecured claim against Richard Pickens. In addition, the Plan was clarified to show that the first lien indebtedness of Vera Hume on certain real estate owned by Richard Pickens has been established to be in the amount of $55,761.66. The Plan was also modified to provide that all non-exempt assets of Richard Pickens were to be applied to

pay his unsecured creditors with the exception of patents, listed by Mr. Pickens in the schedules of the estate at minimal value. The above modifications were ordered by the court pursuant to 11 U.S.C. § 1127(a); and such modifications were approved by this Court and were so minor that they do not require additional disclosure pursuant to 11 U.S.C. § 1128.

b. During the course of the confirmation hearing, the Plan was modified by the Proponents to provide for an additional class in the Richard Pickens Case, Pickens Class 11. The only interest holder in Pickens Class 11 is Richard W. Pickens. This modification was ordered by the Court pursuant to 11 U.S.C. § 1127(a), and such modification was approved by this Court and is so minor that it does not require additional disclosure pursuant to 11 U.S.C. § 1125. Under the Plan, Richard W. Pickens, the only interest holder in Pickens Class 11, shall retain his exempt property and two patents which the parties have stipulated to have no value to anyone other than the debtor, Richard W. Pickens.

B. *Determinations Necessary For Confirmation*

1. *The value of assets other than the corporate lawsuit or the personal lawsuit.*

a. *The Texas Extrusion Case*

There was no dispute about the value of the assets of Texas Extrusion, other than the corporate lawsuit. The major non-lawsuit asset of that estate was machinery and equipment. Only the proponents of the Plan introduced testimony on the value of these assets. Through Mr Patrick Stephens and Mr. Leslie Miles of RSI-Appraisal Group, the proponents established the liq-

uidation value of the machinery and equipment to be $411,000.00 and the fair market value of the machinery and equipment to be $1,540,000.00. Based upon this evidence the court finds that in a liquidation the assets of Texas Extrusion would not be purchased for more than is being paid by Cressona for those assets.

b. *The PII Case*

The only asset in this case is the outstanding stock of Texas Extrusion Corporation.

c. *The Richard W. Pickens Case*

There was a dispute as to the value of the two major assets of Mr. Pickens, (other than the personal lawsuits) the buildings (or improvements) that housed the Texas Extrusion Corporation operation and 139 acres of land (more or less) on which the plant was located. Mr. Patrick Stephens and Mr. Leslie Miles of RSI-Appraisal Group, (witnesses who have appeared before this court on numerous occasions and in whom the Court has great confidence) called by the proponents, estimated the fair market value of the 139 acres at $217,-000.00. Mr. Milstead, an appraiser called by the debtors, estimated the fair market value of the land at $431,564.00.

Mr. Patrick Stephens and Mr. Leslie Miles testified to a value using the income approach of the buildings to be $547,058 and the fair market value for the buildings at $1,100,000.00. Mr. Milstead testified the buildings had a liquidation value of $1,074,580.00 and a liquidation value of the two buildings and improvements of $1,207,333.00.

Based upon all of the evidence, weighing and considering all relevant factors, including the credibility, experi-

ence, and individual biases of the various witnesses, the court finds that in a liquidation, the assets of Richard W. Pickens would not be purchased for more than is being paid by Cressona for those assets.

Mr. Pickens included in his schedules two patents valued at $1,000 apiece. Lockheed, a creditor (Pickens Class 3), the Trustee and the Official Creditor's Committee announced in Court it considered the patents to be valueless and would stipulate such asset could be abandoned to the debtor-in-possession. The debtor-in-possession agreed to such stipulation.

Mr. Pickens did testify the patents were of value to him. However, there was no evidence they were of value to anyone else, or could be sold for any amount of money. Since Lockheed has agreed to abandon the property, the only other class that could have objected was Pickens Class 10. The only creditors in that class voting to reject were Pickens' daughters and a friend. The debtor-in-possession did not raise an objection on their behalf, nor does it seem likely the debtor's daughters would have objected to their father keeping his patents.

d. *The Louise R. Pickens Case*

There was no dispute as to the value of assets in this estate, other than the personal lawsuit.

2. *Liabilities*

a. *The Texas Extrusion Case.*

The unsecured pre-petition indebtedness of Texas Extrusion Corporation is in the approximate amount of $4,354,000.00. The secured pre-petition indebtedness of Texas Extrusion Corporation to Lockheed was stipu-

lated by the parties for the purposes of this hearing to be $7,140,000, which is secured by liens and/or security interest in substantially all of the assets of Texas Extrusion Corporation. The unsecured pre-petition priority indebtedness of Texas Extrusion Corporation is in the approximate amount of $44,000.00. The unpaid post-petition priority administrative indebtedness of Texas Extrusion Corporation is in the approximate amount of $975,000.

b. *The PII Cases.*

The sole pre-petition indebtedness of Pickens Industries Incorporated is in the approximate amount of $7,140,000 owed to Lockheed pursuant to its guarantee of all indebtedness of Texas Extrusion Corporation to Lockheed. This indebtedness is secured by a pledge of 100% of the stock of Texas Extrusion Corporation which is owned by Pickens Industries Incorporated. The sole post-petition priority administrative indebtedness of Pickens Industries Incorporated will be the allowed attorneys fees incurred by it as debtor-in-possession.

c. *The Richard Pickens Case.*

The unsecured pre-petition indebtedness of Richard W. Pickens is in the approximate amount of $880,000. The major portion of the secured pre-petition indebtedness of Richard W. Pickens is to Lockheed and is in the following forms: (a) a nonrecourse guaranty of all indebtedness of Texas Extrusion Corporation to Lockheed, stipulated to be in the amount of $7,140,-000.00; and (b) a limited guaranty of approximately $798,000 of indebtedness of Texas Extrusion Corporation to Lockheed; each of (a) and (b) being secured by second liens on 25 acres of real property and all

improvements thereon upon which the Texas Extrusion operations are located (the "Pickens Real Estate") and 114 acres of real property contiguous to the Pickens Real Estate (the "Unimproved Real Estate") owned by Richard W. and Louise Pickens, and a first lien on a 6 inch press owned by Richard W. Pickens. [Additional secured pre-petition indebtedness of Richard W. Pickens is in the approximate amount of $750,000.00.] The unpaid pre-petition priority indebtedness of Richard W. Pickens is in the approximate amount of $39,000.00 and unpaid post-petition priority administrative indebtedness will be in the amount of the allowed attorneys fees incurred by the debtor-in-possession.

d. *The Louise Pickens Case.*

The unsecured pre-petition indebtedness of Louise Pickens is in the approximate amount of $393,000 and includes a claim filed by the Small Business Administration ("SBA") subsequent to the filing of schedules, the execution of the Plan and its mailing. The secured pre-petition indebtedness of Louise Pickens is to Lockheed in the following forms: (a) a nonrecourse guaranty of all indebtedness of Texas Extrusion Corporation to Lockheed stipulated to be in the amount of $7,140,000.00; and (b) a limited guaranty of approximately $890,000 of indebtedness of Texas Extrusion Corporation to Lockheed; each of (a) and (b) being secured by second liens on 25 acres of real property and all improvements thereon upon which Texas Extrusion operations are located (the "Pickens Real Estate") and 114 acres of real property contiguous to the Pickens Real Estate (the "Unimproved Real Estate") owned by Richard W. and Louise Pickens, and a first lien on a

6 inch press owned by Richard W. Pickens. Other pre and post petition liabilities of Louise Pickens are de minimis.

D. *The Corporate Lawsuit and the Personal Lawsuit*

Texas Extrusion Corporation is the main operating entity of the Debtors herein. Richard W. Pickens formed and commenced operations of Texas Extrusions Corporation in Farmersville, Texas, in 1975. In 1979, Texas Extrusion Corporation was approached by Lockheed personnel with whom Mr. Pickens had become familiar during his career in the aluminum extrusion industry. Lockheed was at that time substantially involved in the manufacture and sale of a commercial aircraft known as the "L-1011" and was in the need of an additional supplier of hard alloy aluminum extrusions for the L-1011. Texas Extrusion Corporation initially declined Lockheed's request for it to become a supplier of said product due to the fact that the Texas Extrusion Corporation operations would need to be substantially revised in order to supply said products, which would necessitate a substantial infusion of capital. However, Texas Extrusion Corporation eventually agreed to become a supplier of the hard alloy aluminum extrusions, and Lockheed assisted Texas Extrusion Corporaton in the arrangement for a $5,500,000 loan from Lockheed Finance Corporation, a wholly-owned subsidiary of Lockheed. In February, 1979, a Supply Contract was entered into between Texas Extrusion Corporation and Lockheed in which Lockheed agreed to purchase up to certain quantities of hard alloy aluminum extrusions per month depending upon its requirements therefor.

The parties performed under the Supply Contract with no major disputes from March, 1979, to July, 1980, at which point a recession occurred in the aircraft industry thereby substantially diminishing the Lockheed requirements for hard alloy aluminum extrusions. A dispute then developed between the parties regarding Lockheed's obligation to purchase quantities of extrusions from Texas Extrusion Corporation. Texas Extrusion Corporation then began negotiations with Lockheed regarding potential solutions to that dispute. Lockheed, pursuant to its negotiations with Texas Extrusion Corporation, agreed to attempt and in fact attempted to solicit additional purchases of Texas Extrusion Corporation product through its associations and contacts in the industry. However, due to previous supplier relations by those parties, and the recession in the aircraft industry, Lockheed and Texas Extrusion Corporation were unsuccessful in obtaining meaningful alternative purchasers for Texas Extrusion Corporation's product. Throughout the term of these negotiations between Lockheed and Texas Extrusion Corporation, Texas Extrusion Corporation was unable to service its indebtedness to Lockheed Finance Corporation.

In February, 1981, Lockheed Finance Corporation proposed an Amended Credit Agreement and Lockheed proposed an Amended Supply Contract to Texas Extrusion Corporation in order to resolve the pending controversies and problems of the respective parties. Texas Extrusion Corporation, pursuant to advice from its counsel, Congressman Ralph Hall, a competent and highly qualified attorney, refused at that time to execute the proposed amended agreements. From February, 1981, to September, 1981, Lockheed and Texas Extrusion Cor-

poration, with the assistance of its counsel, Congressman Ralph Hall, continued negotiations regarding the original Credit Agreements and Supply Contract and the execution of the proposed amended agreements. In September, 1981, Texas Extrusion Corporation executed the Amended Supply Contract and the Amended Credit Agreements.

Paragraph two of the Amended Supply Contract contains the following provision:

> The parties hereto agree that this agreement supercedes and replaces the Agreement of February 22, 1979, as amended, including Amendment Number 1 dated April 4, 1979 between the parties and that the parties waive all rights or claims under said Agreement (except for uncompleted purchase orders) and each party releases the other from its obligations under said Agreement (except for performance and payment under uncompleted purchase orders).

Richard W. Pickens, on behalf of Texas Extrusion Corporation, executed the Amended Supply Contract dated September 2, 1981 with full knowledge of the contents thereof while being competently represented by counsel, Congressman Hall, who in fact, advised Texas Extrusion Corporation not to execute the Amended Supply Contract and who additionally advised Texas Extrusion Corporation that it was, through the execution of the Amended Supply Contract, foregoing a claim against Lockheed Corporation for the breach of the original Supply Contract.

In connection with the Amended Credit Agreement, Lockheed Finance Corporation advanced an additional $435,000 to Texas Extrusion Corporation and renewed and extended all previous loans. Subsequent to the execu-

tion of the amended agreements, Lockheed purchased the Texas Extrusion Corporation debt and collateral position from Lockheed Finance Corporation.

Subsequent to the filing of the voluntary petition by Texas Extrusion Corporation, its counsel Mr. Philip Palmer, filed the corporate lawsuit for negotiating and settlement purposes in order to facilitate the reorganization of Texas Extrusion Corporation and with a view toward generating from such lawsuit some funds for the unsecured creditors of Texas Extrusion Corporation. Mr. Palmer later withdrew as attorney in that action and Sheldon Friedman, Esquire, was substituted for Mr. Palmer. Mr. Friedman withdrew as counsel in both the corporate and personal actions in February, 1984 and Emil Lippe, Esquire, was substituted for Mr. Friedman in the personal lawsuit and has sought to be substituted in the corporate lawsuit. This Court denied Mr. Lippe's motion to be substituted as counsel in the "corporate lawsuit" because of the objection of the Trustee, Mr. Dan Stewart. This Court feels that the Trustee of Texas Extrusion Corporation should be permitted to select counsel of his choice to prosecute the corporate lawsuit if that should become necessary. The Court held in abeyance the motion of Pickens Industries, Incorporated, Richard W. Pickens, d/b/a Gold Sun Aluminum, Inc. and Louise Pickens to intervene in the corporate lawsuit pending the outcome of the hearing on confirmation of the plan.

The testimony of Mr. Pickens, the exhibits introduced into evidence and the pleadings on file, when combined with the testimony of the various legal experts called to place a value on the personal and corporate lawsuits,

have provided the Court with the facts necessary to render an intelligent and objective opinion on the reasonable value of the corporate and personal lawsuits.

The Debtors presented testimony of three attorneys, Dan Boyd, Frank Hytken and Sheldon Friedman, on the value of the corporate lawsuit. Both Mr. Boyd and Mr. Heytken have spent a limited amount of time in reviewing the corporate lawsuit. Their evaluation consisted of reviewing Mr. Pickens' deposition, talking with Richard Pickens, reading documents supplied by trial counsel for Richard Pickens and Louise Pickens and reviewing certain pleadings. Neither man conducted a review of Texas Extrusion Corporation documents nor did they talk with any representative of Lockheed. Neither man discussed the value of the lawsuit with the Creditors' Committee. All of their review occurred within a week or two before the confirmation hearing in this case. Both men were hired specifically to give expert testimony in this case. Both men admitted their evaluation was not made from the standpoint of creditors and what might be in their best interest but rather solely from the viewpoint of the debtor corporation and the interest of its equity security holder.

Mr. Boyd testified that the settlement value of the corporate lawsuit is $20 million. Mr. Hytken testified that the settlement value of the corporate lawsuit is $20-30 million, and the settlement value of the personal lawsuit is $500,000 to $1,000,000.

Mr. Friedman served as trial counsel for Texas Extrusion Corporation from June of 1983 until February 1984, when he filed a motion to withdraw as counsel of record. Mr. Friedman had reviewed all the depositions

taken in the corporate lawsuit, and all of the pleadings. He talked with Richard Pickens about the case. He did not testify to having conducted a review of any Texas Extrusion Corporation documents, to discussing the facts of the case with anyone other than Pickens, he had taken no depositions of representatives of Lockheed and did not testify to discussing the facts of the case with Lockheed representatives. Mr. Friedman testified that in the summer of 1983 at a settlement conference convened at his request he made an opening offer to settle the corporate lawsuit for forgiveness of the Lockheed debt plus $6,000,000. Mr. Friedman testified that the settlement value of the corporate lawsuit is $20-22 million and the settlement value of the personal lawsuit which he had filed while representing the Pickens is in excess of $6 million.

Mr. Dan Stewart, trustee for Texas Extrusion and Mr. John Price, a litigation partner in Mr. Stewart's law firm, also testified about the value of the corporate lawsuit. Mr. Stewart testified the settlement of the corporate lawsuit under the proposed Plan was, in his opinion, not an unreasonable settlement. Mr. Stewart based his conclusions on discussions with counsel for Lockheed, with Sheldon Friedman, with Philip Palmer, with Richard W. Pickens, with Ralph Hall, with Mr. Price and the attorney for the Official Creditors' Committee. Mr. Stewart had also reviewed certain pleadings, depositions and documents. Mr. Price had reviewed all of the pleadings, all of the Lockheed documents that had been produced during discovery in the corporate lawsuit and summaries of all depositions in the corporate case. Mr. Price testified that the settlement value of the corporate lawsuit is $10-12 million.

The probability of success on the merits in the corporate lawsuit is no greater than 50%. If the case was strong, the Trustee would have every reason to prevent compromise and settlement because of the money that could be forthcoming to the estate and his own law firm, if they were to handle prosecution of the action. The Trustee's recommendation to dispose of the litigation under these circumstances indicates he believes that there is only a marginal possibility of the corporate lawsuit generating an overall settlement better than that provided for in the Plan.

It has been stipulated that all of the assets of Texas Extrusion Corporation secure and are subject to the lien of Lockheed Corporation for its outstanding indebtedness of $7,140,000. Accordingly, without the existence of the corporate lawsuit, the assets of Texas Extrusion Corporation would be dedicated to the Lockheed indebtedness resulting in no payment of the post-petition administrative indebtedness in the approximate amount of $975,000 and no payment of the pre-petition unsecured indebtedness of Texas Extrusion Corporation in the approximate amount of $4,354,000.

In order for the Pickens, as equity security holders, to receive any benefits from the corporate lawsuit against Lockheed it would be necessary for the total recovery from the corporate assets and the lawsuit to be in excess of $12,469,000 (corporate assets consisting of machinery and equipment of $1,550,000 miscellaneous assets of $119,000 and lawsuit $10,800,000). The sum of $12,-469,000 is calculated as follows: $7,140,000 secured debt of Lockheed, $975,000 in administrative claims and $4,354,000 in unsecured creditors claims (who would

be entitled to be paid in full before Pickens received anything). Of course costs and attorneys fees would have to be added to the recovery of 12,469,000 before Pickens would receive anything.

The creditors of Texas Extrusion Corporation, through the testimony of the Chairman of the Creditors' Committee and the attorney for the Creditors' Committee, have stated that they want the litigation disposed of under the Plan. They believe the chances of success on the merits, due to the Amended Supply Contract and the release contained therein, and the possible recovery from the lawsuit if it is successful do not warrant prosecuiton of these lawsuits in lieu of the benefits under the Plan. They also stated the Plan is in the best interests of the creditors of Texas Extrusion Corporation.

The attorney for the Official Creditors' Committee testified this position remained unchanged after a consideration of all of the testimony, evidence, exhibits and argument of counsel at the hearing on the confirmation of the Plan commenced on February 22, 1984.

Mr. Stewart was the first person to testify about the value of the corporate lawsuit. He was present during all remaining testimony except for the testimony of one appraiser. He also was the last witness to testify in this case, and stated the evidence he had heard had not changed his opinion about the value of the corporate lawsuit except to strengthen his conclusion that disposal of that lawsuit, through the proposed Plan, would not be unreasonable.

Taking into account and considering all relevant factors, the Plan provides a reasonable settlement value for the corporate lawsuit, is fair and equitable and in the best

interests of the creditors of Texas Extrusion Corporation and of Texas Extrusion Corporation bankrupt estate. This conclusion is supported by the testimony of Mr. Price and Mr. Stewart. Those lawyers stand in the most neutral position in evaluating the corporate lawsuit. Mr. Stewart, as trustee, must consider the interest of not only the debtor, but also the creditors. From considerable past experience, this court is well aware of the experience, competence, fairness and judgment of Mr. Stewart.

Testimony as to the value of and probability of success on the merits of the personal lawsuit filed by Mr. Friedman on November 5, 1983, was provided by Mr. Cecil Magee, an attorney called by Lockheed to testify and Mr. Hytken and Mr. Friedman. Mr. Magee stated the personal lawsuit fails to state a claim upon which relief can be granted and therefore had a zero chance for success. Mr. Hytken stated the personal lawsuit had a 40% to 50% chance of succeeding on the merits. However, Mr. Hytken also testified that if Richard Pickens and Louise Pickens had not lost any collateral, then the first count for relief in the personal lawsuit would be subject to a Motion for Summary Judgment. Mr. Hytken also testified that the second and third counts for relief as pleaded do not state a claim upon which relief can be granted, and if no actual damages are obtained under the personal lawsuit, no punitive damages could be recovered under count four of that action. As the personal lawsuit is presently pleaded it has little or no value. This conclusion is supported by the testimony of Mr. Magee and Mr. Hytken.

The history of the controversy as alleged in both the corporate lawsuit and the personal lawsuit is essentially

identical. The prosecution of both corporate and individual lawsuits would be extremely complex and time consuming requiring extensive further discovery. The testimony establishes that there are numerous legal and factual issues, requiring discovery all over the country. A considerable period of time would be required to prepare these cases for trial. The testimony did not establish that the respective estates have the funds to pay for the expenses of such litigation, let alone attorneys' fees.

Based upon all of the evidence, weighing and considering all relevant facts, the credibility, experience and individual biases of the various witnesses, and after considering the probability of success in both the corporate and personal lawsuits, the complexity of the litigation and the expense, inconvenience and delay necessarily attending it and the paramount interest of the creditors with proper deference to their views, this court finds that the settlements of both the corporate lawsuit and the personal lawsuit pursuant to the Plan are both fair and equitable and in the best interests of the creditors and the respective bankruptcy estates.

E. *Confirmation of the Plan*

1. *The Texas Extrusion Case*

TE Class 9, which is Pickens Industries Incorporated (PII), the holder of all the stock of TE did not vote and may be deemed to have accepted the Plan. If, however, PII's failure to vote is a rejection of the Plan, then PII is retaining its stock under the Plan and is unimpaired. If, however, it is regarded as impaired, this Court, pursuant to 1129(b)(2)(C) (i) finds that the stock has no value, and PII is receiving the value of its interest under the Plan.

2. *The PII Case*

The creditors in PII Class 4 are the unsecured creditors of PII and they are impaired. The sole member of this class is Richard W. Pickens, an insider. No vote was received from this class and it may be deemed to have accepted the Plan, but, if not, the Court finds that pursuant to Section 1129(b)(2)(B)(ii), the holder of any claim or interest that is junior to the claim of PII Class 4 will not receive or retain on account of such junior claim or interest any property under the Plan.

PII Class 5 is the equity security holders who own the stock of PII. The members of the class are Richard W. Pickens and Louise Pickens who own approximately 80% of the stock and one or more children of Richard W. Pickens and Louise Pickens who own approximately 20% of the stock. All members of this class are insiders. No votes were received from this class and they may be deemed to have accepted the Plan, but if not, they are regarded as unimpaired, since the members of this class retain their stock. If, however, they are regarded as impaired, this Court finds pursuant to Section 1129(b)(2)(C)(i) that the stock has no value and the equity security holders are receiving the value of their interest under the Plan.

3. *The Richard W. Pickens Case*

In the Richard Pickens case, Pickens Class 10 voted to accept the Plan in amount, but there was a tie in number (3 to accept and 3 to reject) of members of the class. Two of the members of this class who voted not to accept the Plan were children of Richard W. Pickens and Louise Pickens and are regarded as insiders.

This class is the unsecured creditors of Richard W. Pickens and the class is impaired. This Court finds, pursuant to Section 1129(2)(B)(ii) that no holder of any claim or interest that is junior to the claims of such class will receive or retain on account of such junior claim or interest any property.

There is only one member in each of Pickens Classes 6 and 8. The member of each of these classes is a secured creditor, and the security of the debtor is being abandoned to said creditors under the Plan. No vote was received by either creditor in Pickens Classes 6 or 8 and, therefore, if impaired, they may be deemed to have accepted the Plan. The evidence indicated that the security of each such creditor was approximately equal to or greater than the amount of each of such creditor's debt, therefore, the Court found that these classes were unimpaired and deemed to have accepted the Plan in the vote tally discussed above. In the event this finding is held erroneous, the Court finds that pursuant to Section 1129(b)(2)(A)(iii), each such creditor is realizing the indubitable equivalent of their claim under the Plan.

The only interest holder in Pickens Class 11 is the debtor himself, Richard W. Pickens. No vote was received from Richard W. Pickens, and he may be deemed to have accepted the Plan, but if not, then pursuant to § 1129(b)(2)(C)(ii), Richard W. Pickens is receiving under the Plan the value of his interest in the Richard Pickens Case.

4. *Louise Pickens Case*—In the Louise Pickens Case, no vote was received from Louise Pickens Class 5. The only interest holder in Louise Pickens Class 5 is Louise Pickens herself, the debtor. No vote was received

from Louise Pickens, and she may be deemed to have accepted the Plan, but if not, the Court finds that pursuant to 1129(b)(2)(c)(i) she is receiving under the Plan the value of her interest in the Louise Pickens Case.

For those classes in each of the four cases that are impaired and have not accepted the Plan, the Court finds pursuant to Section 1129(b)(1) that as to each class of creditor in each case the Plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the Plan. All other creditors in all cases have voted to accept the Plan, or are not impaired. In light of these findings, all of the requirements of § 1129 having been met and the Plan is confirmed in all four cases.

To the extent it is determined that any of these findings of fact are conclusions of law or alternatively any of these conclusions of law are findings of fact they are hereby adopted for that purpose.

## II. CONCLUSIONS OF LAW

The Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

The Proponents of the Plan have complied with the applicable provisions of Chapter 11 of the Bankruptcy Code.

The Plan has been proposed by the Proponents in good faith and not by any means forbidden by law.

(A) Any and all payments made or promised by the Proponents and the purchaser of property under the Plan, including payments for services, costs and expenses

in, or in connection with, the cases subject to the Plan, or in connection with the Plan and incident to the cases subject to the Plan, have been disclosed to this Court; and

(B) None of the payments referred to in (A) above have been made before confirmation of the Plan; any and all of such payments to be fixed after confirmation of the Plan are subject to the approval of this Court as reasonable.

The Plan provides for the sale or disposition of all non-exempt assets of the estates and, accordingly, does not contemplate ongoing business operations of the debtors . The provisions of § 1129(a)(5)(A) have therefore been met which requires:

(A) the identity and affiliations of all individuals proposed to serve, after confirmation of the Plan, as a director, officer or voting trustee of the debtors, an affiliate of the debtors participating in the Plan with the debtors, or a successor to the debtors under the Plan, has been fully disclosed and the appointment to, or continuance in, such office of such individuals, is consistent with the interests of creditors and equity security holders and with public policy.

(B) the identity of all insiders that will be employed or retained by the reorganized debtors, and the nature of any compensation for such insiders has been disclosed.

With respect to each class, each holder of a claim or interest of such class has accepted the Plan, or will receive or retain under the Plan on account of such claim or interest property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would so receive or retain if the debtors were liquidated under Chapter 7.

With respect to each class, such class has accepted the Plan, or such class is not impaired under the Plan, or the Plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interest that is impaired under and has not accepted the Plan.

Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Plan provides that:

(A) With respect to a claim of a kind specified in sections 507(a)(1) or 507(a)(2) of the Bankruptcy Code, on the effective date of the Plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim.

(B) With respect to a class of claims of a kind specified in sections 507(a)(3), 507(a)(4) or 507(a)(5) of the Bankruptcy Code, each holder of a claim of such class will receive, if such class has accepted the Plan, deferred cash payments of a value, as of the effective date of the Plan, equal to the allowed amount of such claim; or, if such class has not accepted the Plan, cash on the effective date of the Plan equal to the allowed amount of such claim; and

(C) With respect to a claim of a kind specified in section 507(a)(6) of the Bankruptcy Code, the holder of such claim will receive on account of such claim cash on the effective date of the Plan equal to the allowed amount of such claim.

At least one class of claims in each case has accepted the Plan, determined without including any acceptance of the Plan by an insider holding a claim of such class.

Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtors or any successor to the debtors under the Plan, since such liquidation or reorganization is proposed in the Plan.

All modifications of the Plan have been made in accordance and compliance with § 1127 of the Bankruptcy Code, with the requirements of due process of law and § 102 of the Bankruptcy Code as they apply to confirmation hearings and with all other applicable sections of the Bankruptcy Code.

The First Amended Disclosure Statement approved by the Court after hearing on January 24, 1984, and mailed to all creditors and equity security holders in each case is in accordance and compliance with Section 1125 and all other applicable sections of the Bankruptcy Code.

The Plan does not effect substantive consolidation of the four separate proceedings thereunder. Each estate's assets and liabilities are treated separately under the Plan, and each estate receives separate benefits under the Plan.

Any votes on the Plan sent to the Bankruptcy Court or Clerk were obtained in violation of § 1126(e) of the Code and cannot be included in the vote tally.

The Plan is in the best interest of the estates and their creditors and therefore should be, and it is confirmed.

In accordance with these Findings of Fact and Conclusions of Law I have today signed an Order confirming the Plan. The matter of confirmation of the Plan of Reorganization and the approval of the sale of property contemplated thereby, which was the subject of hearings

in this court on February 22, February 29, March 2nd and March 3, 1984, are matters which are the very basis and heart of a Chapter II case under the Bankruptcy Code. As specifically provided in Paragraph (d)(3)(A) of the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings adopted December 23, 1982 ". . . proceedings in respect to the confirmation of plans [and] orders approving the sale of property . . ." are not related matters. Accordingly the Order of Confirmation I have signed is a final judgment and dispositive order and the "Notice of Non-Consent" filed herein March 8, 1984, reviewed by the Court is of no effect.

At Dallas, Texas, this 20th day of March, 1984.

By: /s/ JOHN C. FORD
Honorable John Ford,
Bankruptcy Judge

## APPENDIX E

[904]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BK NO. 382-00387-F

IN RE:
TEXAS EXTRUSION CORPORATION,
DEBTOR

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BK NO. 382-00386-F

IN RE:
PICKENS INDUSTRIES, INCORPORATED,
DEBTOR

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BK NO. 383-00008-F

IN RE:
RICHARD W. PICKENS d/b/a
GOLD SUN ALUMINUM, INC.,
DEBTOR

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BK NO. 383-01542-F

IN RE:
LOUISE PICKENS,
DEBTOR

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CONFIRMATION HEARINGS

VOLUME IV

BE IT REMEMBERED that on the 3rd day of March, 1984, before the Honorable John C. Ford, United States Bankruptcy Judge, at Dallas, Texas, the above styled and numbered cause came on for Hearing and the following constitutes the Transcript of such proceedings as hereinafter shown:

* * *

[1121]

And I think that's instructive, because you've had four full days of hearings, you've in effect conducted a mini-trial on these claims, you have heard from many experts and I think the evidence is before Your Honor to uphold on appeal findings and conclusions that you will render in your consideration for approval of this plan.

THE COURT: All right. Thank you.

MR. LIPPE: Your Honor, although we hadn't planned to argue, I would object if Mr. Stewart's argument is in any sense some purported modification or amendment or change at the final hour of what we were here all about.

THE COURT: Mr. Lippe, do you want to reply to Mr. Stewart? You can.

MR. LIPPE: I wanted to object to any attempt to treat this as a compromise hearing, because this isn't what it was about.

THE COURT: I'll treat it as a regular Chapter 11 liquidating plan.

MR. LIPPE: That's what we thought.

THE COURT: Based on the pleadings on file—and some of those recently filed may not be on file—but all

pleadings in the case and the exhibits that have been offered and admitted into evidence and Proponents or Plaintiff's Exhibits 1 thru 30 and Defendant's Exhibits or Debtor's Exhibits thru 17, 1 thru 17, and any other exhibits that may

[1122]

have been admitted, the testimony of Mr. Dale McCullough, Mr. Pat Stevens, Mr. Steve McCartin, Mr. Dan Stewart, Mr. Tim Garrison, Mr. Early B. Milstead, Mr. Les Miles, Mr. Kerry Levinson, Mr. Dan Boyd, Mr. Frank Hytken, Mr. Sheldon Friedman, Mr. Cecil MaGee, Mr. John Price and Mr. Richard Pickens and giving due regard to counsel's statements throughout the trial and their arguments and their misstatements, I make the flowing Findings of Fact and Conclusions of Law and I reserve the right to amend, to delete or to add to these tentative Findings of Fact and Conclusions of Law as may require in the interest of clarity and justice:

The case was commenced as a voluntary Chapter 11 proceeding in March of 1982. It was Texas Extrusion Corporation, Case No. 382-00387. Mr. Pickens, Richard W. Pickens is president of Texas Extrusion, the principal stockholder and he is a 1935 graduate, I believe, in chemical engineering and has—When he got out of school he worked for ALCOA until I believe 1940 and then he was, went to work for Reynolds, worked for them until 1953 and then he started Texas Aluminum Plant and sold that and then started in 1975 in Farmersville, Texas as Texas Extrusion, his present bankruptcy petition.

Now it wasn't going too good and he was princpally in the soft alloy business, aluminum business in 1975

when he started and wasn't making very, was, well, actually he hadn't

[1123]

made any money the evidence shows until in 1979 he was approached by Lockheed, representatives of Lockheed. He had been in the aluminum business all of this time and he knew people at Lockheed and Reynolds and ALCOA and all of the smaller or a lot of the smaller people, companies in that business and the principals of those companies.

Now at that time in 1979 Lockheed had a contract to manufacture some kind of a plane that they needed aluminum hard alloy, and they may need that in all planes, but anyway, this was an 1119 or 1114, it doesn't make any difference, it was a plane that Lockheed had a contract to build for the Government, so they came to Mr. Pickens and said we would like to have you gear up this plant to make us some hard aluminum alloy; and Pickens said, well, that little plant of his, he didn't feel like he could spend the money and it took up a lot of gearing up to get in the alloy business, he had had that experience with other companies and he didn't think he was interested.

Well, Lockheed needed this hard alloy and it stated that, well, they just kept bugging Mr. Pickens to get into this business and finally they made it so attractive to him that they would loan him 5,000,000, or five and a half million, to improve his plant and expand it and get in this business. And so he geared up, got ready and started producing this aluminum and it was of good quality.

[1124]

Of course as some time went on he had a little problem with the management, as any new company would in getting geared up to full production, but things turned out real good, his production capacity was increasing right along and he also had this contract with Lockheed that they would take so much of his production, as a matter of fact, they'd take it all, at least they would take 250,000 pounds a month and as they got into production, full production, they'd probably take 400,000 pounds or maybe even more a month.

And they were, Lockheed's producing this plane and they, they're needing this hard alloy and Pickens is needing to make money and things are just going fine in 1980 and the, Pickens is exceeding production. One of Pickens' lieutenants or right-hand man, I guess he was, Mr. Ray, and the Lockheed people had gotten together and worked out a little projection that showed that Pickens, Texas Extrusion would make $2700.00. I mean $27,000,000.00 over a ten-year period there based on the amount of product that Lockheed had contracted to take and agreed to take.

Now everybody was happy. Lockheed was making money and Pickens was making money and the planes were flying and they were even exceeding these projections. But as often happens in cases and in times when things kind of slack off, economy does, the planes stopped flying because the contract was canceled and Lockheed didn't go and need this hard alloy.

[1125]

So what did Lockheed do? They stopped buying this

alloy, Lockheed did, and when things got so bad and from all the evidence it shows that Lockheed is not a heartless, big corporation that is just going to try to run over one of its smaller plants or that it's doing business with.

The evidence is clear that certain representatives of Lockheed attempted to get business to replace the loss of their business and get other customers to order from Mr. Pickens or Texas Extrusion, but the, the economies were down and those people that already had the supplies lined up, they didn't, they didn't feel like they could go off and just leave them.

And then another thing is apparently there's some considerable expense in connection with changing some of your suppliers because you furnished the dies, I believe it is. Anyway, Lockheed did its best internally.

The evidence is clear that Lockheed representatives tried to, or at least some of them did, the evidence here on Debtor's No. 8, letter to R. R. Paul says in the part that's highlighted here that: (Reading) "In early 1979, Texas Extrusion entered various arrangements whereby: (1) CALAC could obtain aluminum alloy extrusions from a dependable supplier; (2) through CALAC's demand, Texas Extrusion could, in turn, grow and prosper; (3) Lockheed, with assurances from CALAC, would make a viable loan to Texas Extrusion. Lockheed

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relied on CALAC's assurances and projections that Texas Extrusion would become a primary supplier of hard alloy aluminum."

And then CALAC endorsed the need for the larger press and got them to buy a bigger press, so Lockheed based on what their production people said, business people said, they loaned an additional 500,000 to Texas and rescheduled the long term debt. And then: (Reading) CALAC has committed to purchase at a dollar level and a size distribution sufficient to allow Texas Extrusion to service the Lockheed loan. Though the dollar volume commitment appears to have been met, the size distribution commitment has not been met. Therefore, Texas Extrusion is still having difficulty servicing the Lockheed loan."

Under the deal as originally constructed, Lockheed was to take enough of the product so that Texas Extrusion could pay back the loan on this $5,500,000.00. Now here's the next letter we'll bring in which is interoffice communication dated July 11th, 1980: (Reading) "In order to satisfy the requirements of LFC," that's Lockheed, "the Lockheed-California Company," that's Lockheed Financial, "the Lockheed-California Company was required to make certain dollar commitments relative to the volume of business. Texas Extrusion would require from the California Company, to permit them to service the loan, in accordance with the terms of the

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Loan Agreement."

And (Reading) "Texas Extrusion, as of the first of July, had met 95% of their targets, as regard to production capability, and they are now ready to operate at the rate of 250,000 lbs. per month." So everything is working out fine at this time.

And that (Reading) "Our demand has been substantially reduced," just the first indication that things were kind of turning sour, "and we are in a position now, where it is nearly impossible to procure extrusions at the level we have agreed to."

Now the next letter is May the 11th. It says, this is to A. H. Lorch, to J. M. Anderson and some other fellows from R. R. McKirahan and it says that: (Reading) "We can certainly take whatever action is desirable from a Corporate point of view with respect to the procurement of extrusions from Texas Extrusion Corporation. As indicated, we may terminate our current agreement with Pioneer Aluminum at any time.

"We are concerned about the capacity of Texas Extrusion and their ability to meet our requirements. In addition, we do not know how to assess the reaction of our long standing supply sources such as Alcoa, Kaiser, Martin-Marietta and Consolidated Aluminum if we were to change from Pioneer Aluminum to Texas Extrusion."

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So you've got trouble in the Lockheed organization itself of California and is attempting to live up to their part of the agreement when business fell off, went out there and tried to go, they even came to Texas, went with Mr. Pickens, went around and visited different places they might be able to get business.

Mr. Pickens said they got a little bit, but it didn't do much good. But this next one is June the 4th, '81: (Reading) "We in Materiel have been asked to supply Bob McKirahan with our expected small and medium press extrusion order placements through 1982." Now this

was in connection with this Georgia deal. (Reading) "I believe it is essential that all parties recognize the importance to GELAC of our long-standing relationship," it's another deal about ALCOA and Kaiser. (Reading) "We simply should not jeopardize that relationship by fostering the development of a competitive source *unless* there are overpowering reasons to do so."

Well, California had already developed this source. But apparently the Georgia people felt like that they ought to, California ought to paddle their own canoe and leave them alone.

This is June the 18th, 1982: (Reading) "So, with the help of a $5.5 million loan from Lockheed Finance, we put Texas Extrusion into business. The contract was drawn up indicating various quantities that we would place with them

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over a period of years and everybody went into high speed on the program. Within about ten months, Texas was starting to ship extrusions after having completed their own casting facilities, quality assurance labs, and presses—a relatively good performance. The usual production problems have occurred, mostly Texas being a little hard to deal because of their lack of experienced plant managers and workers, but to my knowledge, a quality problem has never appeared."

In other words, they're just getting the deal off the ground but everything as far as quality is concerned is going along fine. Here's a trip report that was made by the Lockheed people down here to Texas on June 24th and 25th of 1981 and this is in connection to see if

GELAC would take part of this and give them some business; and they found during that trip that Texas Extrusion probably could go ahead and do 80 percent of their requirements without any kind of changes.

And then everything is going along there, Lockheed is having problems, they can't pay their bills. Mr. Pickens said that he had all of these people out there, over 100 people working in the plant and families and he had gathered together a group that were hard working. They showed that they made a profit from January through, January, 1980 through July, 1981.

Now in July they had a—I mentioned that graph that they had of projection they had put out to make this

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$27,000,000.00 over a ten-year period and the projection as prepared, Mr. Pickens has testified that they exceeded projections on every month, I believe, and that everything was going along just the way it should, except the only thing is they were making about twice as much as they had projected. But when the economy changed, Lockheed lost its business, the plane was canceled or cut back, at least, anyway, they didn't have all of this need for this need for this hard alloy.

And so they were unable to or did not take the amount they were required to take under the contract that was made back in 1979 as amended by the April 4, '81 agreement, I believe. And then things just kept getting worse. Texas Extrusion couldn't pay their bills, they couldn't pay Lockheed and Mr. Pickens was running around trying to get orders and he just wasn't able to get orders.

And Lockheed was coming, asking him for the money, wanting him to pay this debt, this five and a half million debt, and he just didn't have the money. He had a good lawyer, the lawyer was with him, he's been the lawyer and friend of him for a number of years, Mr. Hall.

And he consulted with Mr. Hall frequently and finally with, I believe Mr. Pickens said pounding the table and saying we're going to get this contract signed, we're going to get this thing signed today, but it didn't, he didn't sign it until in September, 1981. And that's been introduced,

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this agreement has, as Plaintiff's Exhibit No. 27.

And this agreement No. 27 says on the very first page, the second paragraph: (Reading) "The parties hereto agree that this Agreement supersedes and replaces the Agreement of February 22, 1979, as amended, including Amendment No. 1 dated April 4, 1979 between the parties." Now that was the contract that required and Lockheed in its answer denies it, but in my opinion it did require Lockheed to take a certain amount of product and then later on to increase that amount.

And that Lockheed prepared in connection with Mr. Ray who on his advice and help, a projection that Lockheed took over to the Lockheed Financial to show them how good a deal it was. And they got the five and a half million. They got into production and everything was working out fine and everybody was satisfied, until July when Lockheed, as Mr. Pickens says, dropped the shoe.

That means that they said they weren't going to be able to perform. Now this agreement goes on to say that:

(Reading) "The parties hereto agree that this amendment supersedes and replaces the Agreement of February 22, 1979, as amended, including Amendment No. 1 dated April 4, 1979 between the parties and that the parties waive all rights or claims under said Agreement (except for uncompleted purchase orders) and each party releases the other from its obligations under

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said Agreement, except for performance and payment under uncompleted purchase orders."

Now this brings us to the reason we're here today: A lawsuit that was filed by Mr. Pickens' attorney, Mr. Palmer, Palmer firm, which incidently the Court would at this point state for the record that as far as I know there's no more competent bankruptcy attorney in the Dallas area certainly than Mr. Palmer, so Mr. Pickens had good representation from the outset as far as the bankruptcy case is concerned, the bankruptcy case.

The Palmer firm shortly after this was filed filed a complaint against Lockheed alleging actual damages of $40,000,000.00 and compensatory or—This original complaint is filed as Debtor's 13 in the amount of compensatory damages set forth as $40,000,000.00 and 80,-000,000 is the punitive damages, a nice round figure of $120,000,000.00.

Now when Mr. Pickens saw that $120,000,000.00 in that complaint, he's never been the same since then. He feels that this business predicament he's in has been caused wholly by Lockheed by their failure to live up to the contract and agreement they made with him in 1979; that if they had lived up to their agreement, that

he'd be well on his way today to making that $27,000,-000.00, probably not already have had it made, the price of aluminum has gone up, I mean the price of the product he's making has gone up, he's on the verge of

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coming up with another improvement or another patent that would make more money.

And when Mr. Palmer was not moving along on this case as fast as he should have, he was discharged by Mr. Pickens and Mr. Pickens hired an attorney, Mr. Hall, and he, that he knew from Denver, Colorado, gave him a call, Mr. Friedman, and Mr. Friedman took over this lawsuit. And I was impressed with Mr. Friedman. He came down here and testified in this case and he got things moving.

Well, while this was going on, the Debtor was operating this plant and I had a conference in chambers in October, the latter part of October of 1983, regarding this case at which the several attorneys were there, but also the U. S. Trustee, a representative from the U. S. Trustee's office. And it developed that there had been run up considerable administrative expenses that I had no idea about, of course I'm not charged with that information now, but the U. S. Trustee's supposed to take care of that, and also in my Court the attorney for the Debtor is supposed to keep me advised of a situation like that.

There was withholding taxes of over $200,000.00 and as I said, the debt was, post-petition debt was in excess of $900,000.00. I severely repremanded the Debtor's attorney and the U. S. Trustee's office for permitting this

to occur at least without bringing it to my attention and told the U. S.

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Trustee at that time that I was authorizing the appointment of a Trustee and that the Trustee should look into this matter and advise the Court immediately as to what he felt about it.

Mr. Stewart was appointed as the Trustee, I believe, on October the 31st. He reported that he had met with Mr. Pickens and visited the plant and tried to investigate a little bit about it. He said that Mr. Pickens was optimistic about a new order or a possibility of an order, as I recall, or maybe that it was an order, anyway, I told Mr. Stewart that I did not want that plant operated if there were going to be any more administrative expenses run up without being able to pay for them.

Mr. Stewart worked with Mr. Pickens and his people until oh, for about three weeks, as I recall, and then he became convinced that the, that Mr. Pickens was a nice man but that he just wasn't much of a businessman in his opinion and that the plant should be shut down before there was any further administrative loss.

So it was, the plant was shut down. Now I believe this was November the 23rd or something about then. The Creditors Committee attorney had been present at these meetings and as far as I know he voiced no, is my recollection, he had no objection to the Trustee shutting it down. It wouldn't have made any difference to me if he had. As I recall he didn't object to that procedure.

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Now with the plant being shut down, here's what we

have: It's been stipulated by counsel that for the purposes of this hearing only, that the amount of the Lockheed claim is $7,140,000.00 and that it's secured by the assets in each case as set forth in the proof of claims, Nos. 1, 2, 3 and 4 that's filed in this case as Plaintiff's Exhibits 1, 2, 3 and 4.

Now the total unsecured claims of Texas Extrusion is $4,354,270.00 as set forth in Plaintiff's Exhibit No. 6. Mr. Dale McCullough, CPA hired by the Trustee to get accounting information on this case, states that the present inventory is 13,000, that the post-petition accounts receivable numbered 211,000 face amount; that in his opinion he could recover 28,000; that of the present of the pre-petition accounts receivable totaling 230,000 as shown by the schedules, in his opinion these 230,000 accounts receivable should be valued at zero;

That the autos, truck and tractor as shown by the schedule, was valued at $44,000.00, office equipment at $15,000.00 and that security deposits of $18,600.00, cash on hand as $52,000.00. It was also testified to that the tax liability, that withholding was due the I.R.S. in the amount of $213,000.00 delinquent and other taxes of some $80,000.00 for a total of $293,000.00 tax liability.

That accounts payable post-petition, expense of administration were due in the amount of $145,000.00 and they

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hadn't been paid; that lease payments on the two presses were due 65,000 on the five-inch press and 72,000 on the six-inch press;

Real estate payments were due in the amount of $99,200.00 for, total lease payments were due and unpaid in the amount of $236,200.00 and then you add on that the debts that's due to Pickens, Trustee's estimated fee of $35,000.00, attorney for the unsecured creditors of 20,000, attorney for the Debtors 34,000, all of those total over $950,000.00, almost a million dollars in priority administrative expense claims.

Now the evidence shows that efforts were made by Lockheed to see if they couldn't get some kind of a purchaser or somebody interested in taking over the Debtor, Texas Extrusion, and they were, Mr. Herb Speth, one of the witnesses and employee of Lockheed, testified that Michigan General contacted him in 1983 about the case and there was some activity for a while about Michigan General and nothing ever developed there. And then Cressona contacted Speth regarding acquiring the assets. He said he believed it was in the last quarter of 1983 and he later got a draft of a plan involving Cressona.

Now to sort of put this into perspective about the main part of this case, it turns out that Cressona and the Creditors Committee and Lockheed got together and struck a

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plan that's sort of a settlement or compromise plan. Generally this plan provides that Lockheed will waive its claims against the Debtor, the Debtor will waive its claims against Lockheed, settle all lawsuits, everybody will go on their own way and that the assets will be sold to Cressona for enough money to provide for the payment of all the, this million dollars worth of administrative expenses I've been talking about, and to pay the creditors,

the unsecured creditors a total of $475,000.00 cash to be split up among the unsecured creditors.

And it appears at the present time that there will be a dividend on that of around 12 cents on the dollar. The Creditors Committee attorney thinks that he has a good chance to improve the amount that may be paid due to the fact that some of the claims that are asserted probably will be knocked out or at least reduced and that will result in the claims remaining getting a larger dividend out of this $475,000.00.

Now the Creditors Committee attorney has testified that he's representing the unsecured creditors in this case and he feels that this settlement of the main lawsuit, all the lawsuits for that matter, were the creditors to get this $475,000.00, it is in their best interests and he has advised his committee about the lawsuit, the possibility that they might get a hundred cents on the dollar, that they might win it; then again, they might lose it.

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And after consulting with them and visiting with Mr. Friedman and with Mr. Stewart and the other attorneys, he said he had read the complaint but that he hadn't gone into it in depth, but based on his information and his understanding, he felt that it would be in the best interests of the creditors to have this plan and they joined in and it became a joint plan of the creditors and the Lockheed people.

He said that the creditors didn't have any money to fight this case and believed it would be a long time down the line before anybody knew whether the case was going to pay a hundred cents on the dollar or who is going to

win it or lose it; that one of the things that bothered him in this case as far as the Plaintiff's case was concerning this release that, this instrument had been entered into in September of 1981 after Mr. Pickens knew about all of the trouble that he had signed this lease, release and Lockheed had signed this release and that that was going to be a hurdle that in his opinion was going to be difficult to get over.

Well, the Trustee, Mr. Stewart, whom I mentioned before as having a great deal of confidence in, I've known Mr. Stewart for some years now, he's been in the Bankruptcy Court many times as attorney for the Debtor, as attorney for the secured party, as Trustee and receiver in various cases, big cases, little cases, and he's participated in some of the most involved, complicated cases that have been in this Court.

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But he practices, not only in this Court, but other Bankruptcy Courts in the State of Texas and around the nation. I find him to be a very competent, conscientious lawyer that has its creditors at his heart at all times. He has no problem representing the secured creditor in the morning and talking about lowsey bankrupt and how far he is behind in the property and getting it turned over to him immediately and then in the afternoon representing some poor unsecured creditor and talking about that penny-pinching secured creditor, he's over secured by hundreds and hundreds and thousands of dollars and Mr. Stewart has no trouble taking those positions, I've seen him do it several times, so no matter who he represents he does a good job.

And in connection with the way he handles the business, he contacted Palmer and Ward about the lawsuit and was advised by this firm that they had filed this lawsuit mainly as a settlement—and by that I don't think anyone should be lulled into the fact that they think Mr. Ward and Mr. Palmer, if the case was worth a great deal wouldn't go after it tooth and toenail.

We have Mr. Palmer going, I mean Mr. Stewart going to Denver, Colorado to talk to Mr. Sheldon Friedman, the then attorney, I think that was in December or maybe January of '83, that Palmer was replaced by Sheldon Friedman; and they exchanged phone calls, both of them being busy lawyers, and

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Mr. Friedman and Mr. Stewart finally got together on January the 5th, 1984.

They met at the airport, I believe, and Mr. Stewart's recollection is they met for three or four hours, I believe, and Mr. Friedman's recollection is they met for an hour and a half, I think. They went over the complaint, talked about the various possibilities and the recollection about exactly how far they went in their discussion is not exactly the same, as most recollections aren't, and when Mr. Stewart went to Denver, he went with a law partner of his, John Price and Mr. Price's testimony is more or less in line with Mr. Stewart's recommendation.

Mr. Stewart said he's talking with Friedman, he said Mr. Friedman is very frank and he says I think this suit is winnable, I can win it and quotes and Mr. Stewart said $120,000.00? and Friedman said no, of course not. A good win would be eliminating or knocking out the Lockheed claim of 7 to $8,000,000.00.

Now Friedman made copies of the documents which he had reviewed and went over the evidence real carefully with Stewart and Stewart also reported that based on his information he thought that the plan should probably be accepted and allowed to go forward; that this $900,-000.00 plus in post-petition debt has not been paid, the hazard of litigation, you never know when you're going to win or lose,

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delay in litigation, he just felt like it would be in the interest of the estate as the Trustee that he was, I believe he expressed that he was comfortable with the plan and it should be presented and accepted by the creditors.

In Stewart's report to the Court, he also said that Ralph Hall thought that the case was worth more than Friedman did; that the—The next witness we had in connection with the value of the lawsuit was Mr. Boyd, Dan Boyd. He's an attorney here with Johnson & Swanson, big law firm here in town, good firm, he's involved in general litigation, was formerly with the form of Vinson & Elkins —and between you and me, the best job I ever had offered me was in that firm, and they were down in Houston and I wouldn't even attempt it—that's just a side.

Now Mr. Boyd said he hadn't had too much time to work on this case, he was hired about February 15th, but that he had looked over the case, he had examined the pleadings and examined the exhibits and documents and talked with Mr. Lippe and done some legal research; that he felt that he had spent at least I think 12 hours is what he estimated, and that based on his expertise as a business litigator, general business litigation, based on his

experience and his limited time to go into this case, that he felt that this was a winnable case, that the problem as he saw it about the release was a big hurdle that would have to be gotten over, but he believed it

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could be done;

That Lockheed had turned over a lot of memos and information in response to subpoena, but they had kept back several items—I think he said about 200 or something like that—on the grounds that they were privileged or work product; and said the work product must have been working back in 1914 because it was sometime before this, he didn't say 1914, but he did mention it was back in 1979;

And anyway, he felt like some of these things that were claimed to be work product or privileged would reveal some information that might be helpful. He stated that he thought Lockheed's defenses, that the 1979 contract as amended did not require them to take any certain amount of product; that the documents signed in the 1979 or 1981 document released the obligation; that the claim, Lockheed claimed that;

That the contract breached by Texas Extrusion of delay and delivery and schedules, that those defenses he didn't think were too difficult to get over; that he felt that the loss of profits, that was his main basis for estimation of the value of this lawsuit. He said that evidence showed that the projection that was in evidence, that they would recover some 12 to, make $27,000,-000.00 in profit over ten years was valid and as a matter of fact, they'd probably make more than that;

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That based on the present value of this $27,000,000.00 loss of profits, that that would be the actual damages or compensable damages and that the punitive or exemplary damages would be $23,000,000.00 also.

Now he said there was about a 50/50 chance for compensatory damages and about a 35 percent chance for punitive; and that he felt a good settlement pattern here in this case was $20,000,000.00.

All right. The next expert we have in connection with this litigation of the Texas Extrusion case is Mr. Frank Hytken. Now he spent some time with Pickens and also did some legal research, read the pleadings, read Pickens' deposition and talked, I believe, at a couple or maybe said he looked at a couple of depositions, he didn't read them, just sort of glanced through it. As I got it, he looked at several documents, he spent about, read the answer of Lockheed. He said he spent approximately 17 hours;

That he thought the case was a winnable case; that it had a 60 percent chance of winning; that he thought the settlement value of the lawsuit ranged from 20 to $30,000,000.00; that he thought the actual damages were in the range of $27,000,000.00 to 38,000,000, actual damages, and punitive damages in the range of 100,-000,000 and to reduce that then to 10 percent to make it 10,000,000.

I asked him about this 20 to 30,000,000 that he

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says that would be 20,000,000 actual damages and

10,000,000 on these punitive damages, which is where he got the 30,000,000.

Now we have Mr. Sheldon Friedman who came to testify in this case. Mr. Friedman is obviously a good lawyer. That's the first time I've ever seen him, but I like the way he handled himself on the stand. And he stated what he had done in this case and that he did meet with Stewart and Price in Denver on January the 5th, 1984.

He stated he also had filed a suit against Lockheed for Pickens. He also stated that he told Stewart and Price that he felt the case was winnable but he didn't remember and didn't think he said that it was a push case.

He did admit that it was possible to lose the case, it was also possible that a wash, in other words, each party go their own way and leave each other in the same position, but that he felt this $42,000,000.00 recovery was a good amount, 42,000,000 less the 7,000,000 due to Lockheed.

He felt that these actual damages in the amount of 40,000,000 wasn't entirely out of line, wasn't out of line at all, and that this would increase, be increased by the fact that it wouldn't be unusual for the Court or the jury, if they found actual damages of 40,000,000, to cancel the entire debt due to Lockheed for fraud. He said he felt that a reasonable settlement value of this case was 20, 22,000,000 and he also said that there was a good chance of these punitive damages.

[1145]

Now it's also testified to by Mr. Friedman that one of the trips he came to Dallas and met with the Lockheed lawyers and he's also testified he met with the Creditors

Committee, Mr. McCartin, to discuss the lawsuit. He said that Lockheed representatives was there when he offered to settle at that time for 6,000,000 and Lockheed forgive debt of Texas Extrusion and it appeared that they were not interested, that every time he got with the lawyers, with Thompson & Knight he tried to talk settlement but never got anywhere in the case.

Also Mr. Friedman testified that in the individual cases he thought that settlement of those cases should be in excess of $6,000,000.00 and the Richard and Louise Pickens case, Mr. Hytken testified that the actual damages were 6 to 7,000,000 and he felt that that was a good, 40 to 50 percent chance of recovery, and that he, that he felt the settlement value of that case was 500,000 to 1,000,000.

Now coming to Mr. MaGee, Cecil MaGee, an attorney that testified only in the individual cases, and he said that he had looked the case over and examined the pleadings and done some briefing. And he said that he felt that all of the causes of action alleged in the complaint in his opinion would be subject to summary judgment or dismissal for failure to state a claim on which relief could be granted; therefore, his estimate of the value of the lawsuit was—He also was impressed with the agreement of September 2nd, 1981 between

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Lockheed and Pickens where they released each other and waived all rights and claims.

Anyway, he wasn't too impressed with the lawsuit because he valued it at zero. That's in the individual case. He didn't, he had nothing, no testimony in regard

to the corporate case. Now after we had the, a difference in the, what took place in Denver between Stewart and Friedman, Mr. Price was placed on the stand and he testified generally along the lines, his recollection was the same as Mr. Stewart in most regards, that there was no discussion about antitrust, no projection about profits of 27,000,000, and does not recall any discussion about the 42,000,000 that Mr. Friedman stated that they were talking about.

Now Mr. Price testified that he thought this Texas Extrusion lawsuit had a value anywhere from zero to 20,000,000; that he didn't feel like there was any chance of getting any punitive damages; and that a good settlement figure would be anywhere between 10 and $12,000,000.00. Now as I said in the beginning, everybody, I think, agrees that this whole four or five days we've had here and some evenings together, more than I'm sure you'd care to share with me and especially you're not particularly interested in spending the rest of Saturday with me—It's now 6:20—I keep coming back to Stewart. And It's not so much to what he said as to what he's, what he did in the case.

[1147]

You see, Mr. Stewart as Trustee knowing the obligation he has to do the best he can for the creditors, he's taken this asset, this lawsuit and he has given it very serious consideration for a very important reason, the one thing that makes us all get interested: Money.

Now if Mr. Stewart thought that case could be won, I think, if he thought it would have had a 50/50 chance, with all of these millions of dollars rolling into the estate and some of those millions would be rolling to him and

to his firm, now Mr. Stewart knows that, he realizes it. And like I said, it's not so much what he said but what he did.

If he thought that case could be won, and he frankly admits it's got substance to it, it's not a frivolous lawsuit, he's analyzed, I'm sure, that case, he's gone over it with Price and I'm sure anybody else that he thought could be of help to him in arriving at what he should do in this case. And his conclusion is to give up those millions of dollars that would be coming into his firm.

And if he wanted it, he and his firm would be entitled to a big fee, not to say he's not going to as being Trustee in the case, and I don't mean by that to say that Mr. Palmer's wrong, that Mr. Freedman's wrong or that Mr. Lippe's wrong. Lawyers quite frequently disagree about cases; in other words, if they didn't, we wouldn't have the lawsuits.

Mr. Lippe has been hired at the last minute in this

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case, right on the threshold of when the, well, it was after the disclosure statement, the Court approved the disclosure statement hearing and, disclosure statement, between that and the time set for confirmation. And he has come in and done a wonderful job for his client, Mr. Pickens.

He's almost persuaded me at times that I ought to not confirm this plan because of the possibility or probability, according to Mr. Pickens and Mr. Lippe, that he would recover all of this money and pay off all the creditors and get this money, some left over for Mr. Pickens.

I said almost persuaded. I find that the settlement proposed in this plan of arrangement, the joint proponents, the Creditors Committee and Lockheed in the Second Amended Joint Plan of Reorganization, Texas Extrusion Corporation, Pickens Industries, Incorporated, Richard W. Pickens, d/b/a Gold Sun Aluminum, Inc., and Louise Pickens, Debtor, that this plan having been accepted by the amount and number of creditors as required by the Code and the provisions of the Code pertaining to the confirmation of these plans, of this plan in each of these cases, having been complied with and met, that this Court orders that the Second Amended Joint Plan of Reorganization be and it is hereby confirmed in each of these cases.

This will conclude the hearing today in 382-00387, Texas Extrusion Corporation, 382-00386, Pickens Industries,

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Incorporated, and 383-00008 Richard W. Pickens d/b/a Gold Sun Aluminum, Inc. and 383-01542, Louise Pickens. It is now 6:30 and I want to thank you gentlemen and ladies for coming down on Saturday.

I hated to ask you to do it, but the docket being what it is, there is no way we could have gotten around to this case until sometime this summer.

(End of Proceedings)

## APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CASE NO. 382-00387-F

IN RE:
TEXAS EXTRUSION CORPORATION,
DEBTOR

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CASE NO. 382-00386-F

IN RE:
PICKENS INDUSTRIES INCORPORATED,
DEBTOR

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CASE NO. 383-00008-F

IN RE:
RICHARD W. PICKENS d/b/a
GOLD SUN ALUMINUM, INC.,
DEBTOR

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CASE NO. 383-01542-F

IN RE:
LOUISE PICKENS,
DEBTOR

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FIRST AMENDED
DISCLOSURE STATEMENT

I

*Background Information in Connection with the Texas Extrusion Plan of Reorganization*

Texas Extrusion Corporation ("Texas Extrusion") is a wholly-owned Texas subsidiary of Pickens Industries

Incorporated. Texas Extrusion is primarily in the business of manufacturing aluminum extrusion products. The principal shareholders of Pickens Industries Incorporated, a Texas corporation ("PII"), are Richard W. Pickens and his wife, Louise R. Pickens (the "Pickens"). Both Richard W. Pickens and Louise R. Pickens are in separate Chapter 11 bankruptcy proceedings and they are both officers of Texas Extrusion and PII. The only asset of PII is the common stock of Texas Extrusion.

On February 22, 1979, Lockheed Corporation on behalf of its division, Lockheed California Company, entered into a Supply Contract (the "Supply Contract") pursuant to which Texas Extrusion would furnish metal extrusion products to Lockheed-California Company.

In order for Texas Extrusion to improve and expand its manufacturing facility in Collin County, Texas to meet its obligations under the Supply Contract, Lockheed Finance Corporation, a wholly-owned subsidiary of Lockheed Corporation (hereinafter called "LFC"), extended loans to Texas Extrusion totalling $5 million pursuant to a Credit Agreement in March, 1979 (the "Credit Agreement"). The loans were evidenced by two promissory notes made payable by Texas Extrusion to LFC. The first note was in the principal amount of $2 million and the second note was in the principal amount of $3 million.

To secure Texas Extrusion's obligations under the Credit Agreement and the two notes, Texas Extrusion signed a security agreement dated March 31, 1979 which granted LFC a security interest in substantially all of the Texas Extrusion assets. By its terms, the security agreement not only secured the payment of all of Texas Extrusion's obligations under the Credit Agreement but also secured all other indebtedness that Texas Extrusion

might then or thereafter owe to LFC. As further security to LFC, PII executed a guaranty in favor of LFC. To secure its obligations under the guaranty, PII pledged to LFC all of the issued and outstanding shares of common stock of Texas Extrusion.

Texas Extrusion's obligations to LFC were further secured by a guaranty by the Pickens, the principal shareholders of PII. The guaranty of the Pickens was a non-personal liability obligation of the Pickens secured by a security agreement and a deed of trust. The security agreement granted LFC a security interest in all of the inventory, machinery and equipment owned by the Pickens and used by or leased to Texas Extrusion and the proceeds thereof and all accounts, instruments, leases and contract rights of the Pickens and the proceeds thereof. The deed of trust granted LFC a second lien on the approximately 25 acres of land and improvements in Collin County, Texas where the Texas Extrusion plant is located (the "Pickens Real Estate"). The Pickens Real Estate is subject to a first lien held by the Centennial Savings and Loan Association of Greenville, Texas ("Centennial"). In addition to the non-personal liability guaranty, the Pickens also executed a personal liability guaranty covering an additional $500,000 loan by LFC to Texas Extrusion in December, 1979.

Texas Extrusion was unable to make any of the principal or interest payments required under the Credit Agreement or the promissory notes. Rather than declaring Texas Extrusion in default under the Credit Agreement, security instruments and guaranties, the parties entered into an agreement which restructured all of the loans evidenced by the notes and amended and restated the terms of the Credit Agreement. The restructured agreements were embodied in an Amended and Restated

Credit Agreement dated as of March 1, 1981 (the "Amended Credit Agreement"). The Amended Credit Agreement, however, was not consummated and closed until September 1, 1981. Under the terms of the Amended Credit Agreement, Texas Extrusion issued three promissory notes to LFC. The first note ("Note A") in the principal amount of $5,056,353.56 was issued in substitution and renewal of the original $2 million note and $3 million note. The second note ("Note B"), in the principal amount of $514,547.94 was issued in substitution and renewal of the $500,000 promissory note executed by Texas Extrusion in December, 1979 and personally guaranteed by the Pickens. The third note ("Note C") in the principal amount of $435,000 was issued to evidence additional borrowings of Texas Extrusion from LFC at the time of the consummation of the Amended Credit Agreement. The additional $435,000 was advanced pursuant to the restructuring under the Amended Credit Agreement.

Notes A, B and C provided for repayment of the outstanding principal in 84 monthly installments commencing February 1, 1983. Interest on the Notes was payable monthly commencing in April of 1981 but could be deferred until December, 1981. Texas Extrusion exercised its election to defer all interest payments to December, 1981.

As additional security for the payment of the obligations of Texas Extrusion under the Amended Credit Agreement, Mr. Pickens executed a deed of trust in favor of LFC covering the 114 acres of unimproved land in Collin County, Texas surrounding the Texas Extrusion plant (the "Unimproved Property"). Under that deed of trust LFC received a second lien on the Unimproved Property subject to the first lien held by Vera Hume.

Concurrently with the execution and consummation of the Amended Credit Agreement, Lockheed Corporation, on behalf of its division Lockheed-California Company, entered into an Amended Supply Contract (the "Amended Supply Contract") with Texas Extrusion modifying and amending the original Supply Contract. The Amended Supply Contract contained a paragraph intended by both parties to settle any existing disputes or claims that had developed under the terms of the original Supply Contract and to release each party from damages caused by any breaches thereunder.

On September 2, 1981, after execution of the Amended Credit Agreement and the Amended Supply Contract, LFC assigned all its right, title and interest under the Amended Credit Agreement including all security interests and liens in connection therewith, to Lockheed-California Company. Lockheed-California Company, a division of Lockheed Corporation, assumed all of the obligations of LFC under and pursuant to the Amended Credit Agreement.

Mr. Pickens personally owns a 6″ indirect aluminum extrusion press and certain ancillary equipment (the "6″ Press"). The 6″ Press is leased to Texas Extrusion by Mr. Pickens. Pursuant to the security agreement executed by the Pickens to secure their guaranty of Texas Extrusion's debt to Lockheed, Mr. Pickens' interest in the 6″ Press and his interest as lessor under the lease to Texas Extrusion were pledged to Lockheed. Mr. Pickens also owns a 30% interest in a 5″ indirect aluminum extrusion press and certain ancillary equipment (the "5″ Press"). The other owners of the 5″ Press are Betty Pickens, Mr. Pickens' former wife, Bob Rea, an employee of Texas Extrusion, and Ralph Hall, a Rockwall, Texas attorney. The

5″ Press is also leased to Texas Extrusion by Mr. Pickens and the other owners. The University National Bank of Denver, Colorado holds a first lien on the 5″ Press and a lien on Mr. Pickens' interest as a lessor under the lease to Texas Extrusion.

Texas Extrusion did not meet its payment obligations on the indebtedness due Lockheed under the Notes and on March 15, 1982, Lockheed-California Company gave written notice of default to Texas Extrusion and declared all of the Notes and unpaid principal and interest under the Amended Credit Agreement due and payable. Shortly thereafter, Texas Extrusion filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Concurrently with that voluntary Chapter 11 petition, Texas Extrusion filed a lawsuit entitled *In Re Texas Extrusion Corporation v. Lockheed Corporation, Lockheed Finance Corporation,* as an adversary proceeding in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Texas Extrusion Lawsuit"). The adversary proceeding against Lockheed Corporation and LFC seeks $40 million in actual damages and $80 million in punitive damages. Texas Extrusion alleged that Lockheed Corporation induced Texas Extrusion to enter into the original Supply Contract by falsely overstating its production requirements and that Lockheed Corporation breached its contractual obligations by failing to purchase the quantity of extrusions promised thereby causing Texas Extrusion to go into bankruptcy.

On December 14, 1982, Lockheed Corporation filed a suit in the United States District Court for the Northern District of Texas, Dallas Division against the Pickens to collect that portion of the indebtedness of Texas Extrusion personally guaranteed by the Pickens, i.e., $514,547.94 plus interest.

On February 4, 1983, Mr. Richard W. Pickens (herein called "Richard Pickens" or "Mr. Pickens") filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The action was in the form of a motion to intervene in a corporate bankruptcy previously filed by Mr. Pickens. On November 21, 1983, Louise R. Pickens, Mr. Pickens wife, filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On January 24, 1984, the exclusive period within which Louise Pickens could file a plan of reorganization was reduced by the Court and terminated at 5:00 p.m. on January 24, 1984. The filing by Richard Pickens covered all of the community property and community debts of Richard and Louise Pickens as well as the separate property and debts of Richard Pickens. The filing by Louise Pickens covers only her separate property. The schedules filed by Louise Pickens indicate that she has as her separate non-exempt property 2 acres of unimproved land in Rockwall County, Texas with an unknown value and an interest in the Pickens Lawsuit. Against these assets Louise Pickens has prepetition debts owing to the IRS and the Comptroller of the State of Texas in an unknown amount, local ad valorem and personal property taxes of $1,640.90 and unsecured debts of $522.68 and a disputed and unliquidated debt owing to Lockheed.

On November 15, 1983, Richard and Louise Pickens (herein called "Pickens") filed a lawsuit against Lockheed Corporation and LFC in the amount of $15.5 million alleging that Lockheed Corporation and LFC by their actions in the Texas Extrusion matter forced the Pickens into personal bankruptcy. The proceeding essentially incorporates the allegations of the Texas Extrusion Lawsuit.

Following the filing of its bankruptcy petition, Texas Extrusion remained in possession of its property as debtor in possession until October 28, 1983, when the United States Bankruptcy Court ordered the appointment of a trustee. The United States Trustee for the Northern District of Texas appointed Daniel C. Stewart of Dallas, Texas as trustee (the "Trustee") to take over control and operations of Texas Extrusion. The Trustee accepted such appointment and qualified on or about November 1, 1983. On or about November 22, 1983, the Trustee determined that the facility could not be operated at a profit without a substantial infusion of new capital and he began to wind down the operations of Texas Extrusion. Thereafter, Texas Extrusion was essentially put into a "caretaker" mode. The Texas Extrusion facility and the equipment therein is being maintained under the supervision of the Trustee.

Following the shutdown of the Texas Extrusion plant, the Trustee reviewed the books and records of Texas Extrusion and determined that it had cash on hand of approximately $17,000, utility security deposits of approximately $19,500, accounts receivable less doubtful accounts of approximately $40,000.00 and inventory valued at liquidation of approximately $9,000. The inventory consists of aluminum ingot and aluminum scrap and its estimated value is based on the going rate for aluminum ingot and scrap as determined by the Trustee. Texas Extrusion may have made some preferential transfers prior to the filing of its bankruptcy petition, but the Trustee has not as yet determined if the pursuit of these preferences will benefit the Texas Extrusion Case. Therefore, according to the records of Texas Extrusion, the total liquid resources available to Texas Extrusion for the payment of post petition liabilities is approximately $85,500.00.

Against these resources the Trustee has determined that Texas Extrusion has the following post petition liabilities: approximately $200,000.00 in accounts payable, approximately $180,000.00 in federal tax liabilities (without including any penalties or interest), approximately $50,000 in post petition ad valorem and personal property taxes, approximately $180,000.00 on a certificate of indebtedness to Mr. Pickens and approximately $217,000.00 on deferred lease payments for total post petition liabilities of approximately $827,000.00.

In addition to the post petition liabilities listed above, Texas Extrusion has, according to the Statement of Affairs and the Claims Register on file with the Court: approximately $7,000,000.00 in prepetition secured claims and approximately $3,750,000.00 in prepetition unsecured claims without including any deficiency on any secured claims. The Proponents do not anticipate any deficiencies arising from claims of any secured creditor of Texas Extrusion other than Lockheed. Under the terms of the Plan, Lockheed has agreed to waive its deficiency claim against Texas Extrusion and PII. Additionally, the Texas Extrusion Official Creditor's Committee intend to object to unsecured claims totalling at least $2,700,000, a substantial portion of which constitute claims filed by purchasers of allegedly faulty extrusion presses resulting in damages for the cost of the presses, lost profits and other consequential damages; however, said committee has not had an opportunity to completely evaluate said claims and is therefore unable to predict the outcome of such objectives.

On December 23, 1983, Lockheed, the largest secured creditor of Texas Extrusion, and the Official Creditors' Committee of Texas Extrusion filed a First Amended Joint Plan of Reorganization with the Bankruptcy Court.

Cressona Aluminum Corporation, a Pennsylvania Corportion located in Cressona, Pennsylvania ("Cressona") joined in that Plan for the purpose of acknowledging its obligations under the Plan as purchaser of most of the assets of Texas Extrusion, the 6″ Press, the Pickens Real Estate and the Unimproved Property. Cressona has been in the business of manufacturing metal products since 1979 and according to its President, Jim Stine, its gross annual sales for 1983 is estimated to be approximately $80,000,000.00.

II.

*Joint Plan of Reorganization*

The First Amended Joint Plan of Reorganization was subsequently amended by the Proponents in response to the comments and suggestions of the Trustee, and as a result of changes in the liquid resources available to help pay the administrative claims in the Texas Extrusion Case. The First Amended Joint Plan of Reorganization as amended is entitled "The Second Amended Joint Plan of Reorganization". The Second Amended Joint Plan of Reorganization (the "Plan") deals with the property and claims in each of the following Chapter 11 bankruptcy cases: *In re Texas Extrusion Corporation,* Case No. 382-00387-F (herein called the "Texas Extrusion Case"); *In re Pickens Industries Incorporated,* Case No. 382-00386-F (the "PII Case"); *In re Richard W. Pickens d/b/a Gold Sun Aluminum, Inc.,* Case No. 383-00008-F (the "Richard Pickens Case"); *In re Louise Pickens,* Case No. 383-01542 (the "Louise Pickens Case"). The Plan contemplates the sale of a portion of the assets in the Texas Extrusion Case and the Richard Pickens Case to Cressona Aluminum Company, a Pennsylvania corporation ("Cressona") for a total purchase price of ap-

proximately $2,432,000. In exchange for $1,550,000 of the purchase price, Cressona shall receive, from the Texas Extrusion Case, all of the interests of Texas Extrusion in any property used or useful in the conduct and operation of the business of Texas Extrusion (the "Texas Extrusion Assets") except for any cash, security deposits or other funds of Texas Extrusion (the "Texas Extrusion Funds"), any accounts receivable of Texas Extrusion (the accounts receivable arising after the filing of the bankruptcy petition by Texas Extrusion are herein called the "Accounts Receivable"), any accounts receivable claimed by Texas Extrusion to be owed by Lockheed (the "Lockheed Receivables"), the interest of Texas Extrusion in any lease rejected under the Plan and certain miscellaneous equipment abandoned to secured creditors under the Plan. Cressona has already deposited a portion ($300,000) of the purchase price for these assets with the Trustee as earnest money for the purchase of the Texas Extrusion Assets. In the Richard Pickens Case, the Pickens Real Estate shall be conveyed to Cressona in exchange for $700,000 of the purchase price (the "Real Estate Purchase Price") and the Unimproved Property shall be conveyed to Cressona in exchange for $1,600 per acre or approximately $182,-601.28 of the purchase price (the "Unimproved Property Purchase Price"). During the negotiations for the sale of the various assets, Cressona stated that the possession of the Pickens Real Estate and the Unimproved Property for a substantial period of time was a condition precedent to its purchase of the Texas Extrusion Assets. According to Cressona, the value of the Texas Extrusion Assets are minimal if they have to be moved to another location prior to their use. The Pickens Real Estate is presently being leased to Texas Extrusion by Mr. Pickens. The

term of that lease will expire on April 30, 1986. A mere assumption of Texas Extrusion's interest in that lease by Cressona would not provide Cressona with possession of the Pickens Real Estate for a period of time sufficient to justify the purchase of the Texas Extrusion Assets, therefore the purchase of the Pickens Real Estate by Cressona is provided for under the Plan. The purchase of the Unimproved Property was also a condition to Cressona's purchase of the Texas Extrusion Assets since Cressona wanted some reasonable assurance that it could expand the facility should its operation of the Texas Extrusion Assets prove profitable.

If and when the order of the bankruptcy court confirming the Plan becomes final and nonappealable, a closing (the "Closing") of the transactions provided for under the Plan shall occur. At Closing, Lockheed shall receive the purchase price for the Texas Extrusion Assets, $1,550,000, and that portion of the Real Estate Purchase Price and the Unimproved Property Purchase Price remaining after payment of the claims of the first lienholders on those properties. The sums remaining after the payment to those first lienholders should be approximately $300,000 and $132,601.28, respectively. Provided Lockheed has first received the $1,550,000 sum, the $300,000 sum and the $132,601.28 sum it shall then deposit with the Disbursing Agent, Daniel C. Stewart of Dallas, Texas, the Trustee, $100,000 for payment of the attorney's fees and expenses in all four cases (TE Class 1, PII Class 1, Pickens Class 1 and Louise Pickens Class 1 Claims) and a $612,000 sum. Concurrently therewith, the Texas Extrusion Funds of approximately $145,000 shall be deposited by the Trustee with the Disbursing Agent. The $145,000 sum deposited by the Trustee and the $612,000 sum deposited by

Lockheed (the total of said sums being hereinafter called the "Cash Fund") shall be utilized by the Disbursing Agent for payment of tax, administrative and certain secured claims in the Texas Extrusion Case. In addition, Lockheed shall deposit the sum of $475,000 with the Disbursing Agent for payment to the unsecured creditors in the Texas Extrusion Case and the sum of $522.68 with the Disbursing Agent for payment of the unsecured claims in Louise Pickens Case. The $522.68 sum being herein called the "Louise Pickens Cash Fund."

The Plan provides for the creation of 9 classes of claimants in the Texas Extrusion Case, 5 classes of claimants in the PII Case, 11 classes of claimants in the Richard Pickens Case and 3 classes of claimants in the Louise Pickens Case, as follows:

*Attorney's Fees and Expenses*

*TE Class 1, PII Class 1, Pickens Class 1 and Louise Pickens Class 1:* All Trustee's fees and attorney's fees and expenses in all three cases, shall be paid in full by the Disbursing Agent within 30 days after the date all such administrative fees and expenses are finally allowed, approved and ordered paid by the Court from the $100,000 sum deposited with the Disbursing Agent by Lockheed. The Proponents estimate that the total Class 1 claims in all four cases will be approximately $100,000. In the event that the total attorney's fees and expenses exceed $100,000 each such claimant shall receive a pro rata share of said $100,000 sum. If such claims are less than $100,000 then the sum remaining after the payment of all such claims shall be returned to Lockheed Corporation.

*Post Petition Claims.*

*TE Class 2:* All post petition accounts payable, including any deferred lease payments and any claims of the Pickens arising under his certificate of indebtedness, shall be paid in full within ten days after closing from the Cash Fund. The Proponents anticipate that the post petition accounts payable, including any allowed claims for deferred lease payments and the certificate of indebtedness will total approximately $597,000.00. If the amount claimed by Mr. Pickens for deferred lease payments on the Pickens Real Estate is allowed in full, these claims will total approximately $616,600. Any disbursements to the Pickens arising from post petition claims of the Pickens against Texas Extrusion shall be retained by the Disbursing Agent for payment of the Pickens Class 2, Louise Pickens Class 2, Pickens Class 8, 9, 10 and 11 claims ("Pickens Cash Fund"). The Proponents anticipate that the Pickens Cash Fund will contain approximately $260,000 as a result of the disbursements from the Texas Extrusion Case.

*Tax Claims*

*TE Class 3:* All pre and post petition FICA and withholding taxes, approximately $180,000, and state and local ad valorem taxes, approximately $85,000, shall be paid in full, by the Disbursing Agent within 10 days after Closing from the Cash Fund.

*Lockheed Claims*

*TE Class 4, PII Class 3, Pickens Class 3:* Lockheed, a partially secured claimant in the amount of approximately 7,000,000 in the Texas Extrusion Case,

the PII Case, the Richard Pickens Case and the Louise Pickens Case, shall receive, as full and final payment and satisfaction of any and all of its secured claims in all four cases, (i) the purchase price paid by Cressona for the Texas Extrusion Assets, less the sums deposited with the Disbursing Agent for payment to creditors of Texas Extrusion, leaving Lockheed approximately $298,000 (ii) those portions of the Real Estate Purchase Price and the Unimproved Property Purchase Price which exceeds the claims of the first lienholders on the Pickens Real Estate and the Unimproved Property which excess portions are estimated to be approximately $300,000 and $132,601.28, respectively, (iii) an assignment of the Accounts Receivables and the proceeds thereof, and (iv) any deferred lease payments due the lessors under any lease covering the 6″ Press, which deferred lease payments are estimated to be approximately $72,000. Under § 552 of the Bankruptcy Code, the Court could subordinate the security interest of Lockheed in the 6″ Press and the deferred lease payments associated with that Press, and if the Court so held, the deferred lease payments on the 6″ Press would be paid to the Pickens Cash Fund.

The Trustee has reported that, on or about February 15, 1984, the Accounts Receivables will total approximately $158,800. Approximately $124,800 of that sum is over 120 days old and the remainder, approximately $34,000, is over 90 days old. Furthermore, most of the claims on these Accounts Receivables are subject to setoffs for defective material. A major portion of the Accounts Receivable is a $103,000 receivable from TD Materials. The receivable from TD Materials is over 120 days old and

the Proponents are unaware of any action in the Court by Texas Extrusion to collect this receivable. TD Materials has asserted that the entire amount of the receivable is subject to a setoff for defective material delivered to TD Materials prior to the filing by Texas Extrusion of its petition in bankruptcy. The Plan provides for the retention of jurisdiction by the bankruptcy court to hear any disputes over the collection of the Accounts Receivable including the receivable from TD Materials. Lockheed anticipates that it will recover little if anything from the Accounts Receivable assigned to it under the Plan. Lockheed anticipates that its total recovery in the Texas Extrusion Case and the PII Case will be approximately $298,000. Lockheed will also recover approximately $432,000 on its secured claim in the Richard Pickens Case. Lockheed's unsecured claim against Texas Extrusion and PII as a result of the deficiency in its secured claim will total approximately $5,450,000 and its unsecured claim in the Richard Pickens Case and in the Louise Pickens Case as a result of the deficiency on its secured claim will total approximately $550,000. Under the Plan, however, Lockheed is waiving its unsecured claim in the Texas Extrusion Case and the PII Case and subordinating its unsecured claim in the Richard Pickens Case and the Louise Pickens Case to the claims of all other creditors in those cases.

*Other Secured Claims Against Texas Extrusion*

*TE Class 5:* The collateral securing the claim of the Citizens State Bank of Princeton, Texas, a 1978 Kenworth Tractor with a blown engine, shall be abandoned at closing to such Claimant in full and

final payment and satisfaction of its claim which is in the amount of approximately $10,000. Any deficiency claim by the Citizen State Bank is not anticipated or provided for since the Proponents estimate that the value of its collateral is approximately equal to its claim.

*TE Class 6:* The secured claim of the Associates Commercial Corporation (the "Associates") in the amount of approximately $9,500, and secured by a lien on a blanchard grinder, shall be paid in full within ten days after Closing from the Cash Fund. The Plan provides for the payment of this claim in full because the Proponents estimate that the value of the blanchard grinder is substantially higher than the secured claim of the Associates and in addition, the purchase price for the Texas Extrusion Assets was negotiated in contemplation of the payment of this claim.

*TE Class 7:* The secured claim of the Tandy Corporation in the amount of approximately $6,000, and secured by a first lien on a computer, shall be paid in full within ten days after Closing from the Cash Fund. The Plan provides for the payment of this claim in full because the Proponents estimate that the value of the computer is substantially higher than the amount of the secured claim of The Tandy Corporation and in addition, the purchase price was negotiated in contemplation of the payment of this claim under the Plan.

*Unsecured Claims Against Texas Extrusion*

*TE Class 8:* Each creditor holding an allowed unsecured claim in the Texas Extrusion Case shall

receive a pro rata share (i.e., the amount of each creditors' share being determined by dividing the amount of each unsecured creditors' allowed claim by the total amount of all such allowed unsecured claims) of the $475,000 sum deposited with the Disbursing Agent by Lockheed. The Proponents anticipate that if certain unsecured claims are disallowed as a result of the Committee's objection to those claims, the unsecured creditors will receive approximately $.45 on the dollar, however, if all the unsecured claims are allowed, the unsecured creditors of Texas Extrusion will recover approximately $.12 on the dollar, and

*Texas Extrusion Shareholders*

*TE Class 9:* PII shall retain its stock in Texas Extrusion as full and final payment and satisfaction of its claim.

*Claims Against PII*

*PII Class 2, PII Class 4 and PII Class 5:* The only asset of PII is the stock of Texas Extrusion and the only creditor of PII is Lockheed which holds a security interest in that stock. Obviously, the stock is of no value therefore the only creditors of PII being paid anything under the Plan are the creditors with administrative claims. The Proponents anticipate that the only administrative claim in the PII case will be the attorney's fees for PII's attorney. Lockheed is not receiving anything on the unsecured portion of its claim against PII and the stock of PII is being returned to the shareholders as full and final payment of any of their claims.

*Tax Claims Against the Pickens*

*Pickens Class 2 and Louise Pickens Class 2:* After the disbursements to the TE Class 2 claimants have been made, all pre- and post petition tax claims in the Richard Pickens case and the Louise Pickens case shall be paid in full by the Disbursing Agent from the Pickens Cash Fund.

*Secured Claims Against Pickens*

*Pickens Class 4 and Class 6:* The collateral securing the claims of William D. Russell of Houston, Texas, a first lien on approximately 108 acres in Morris County, Texas; the First State Bank of Rockwall, Texas, a second lien on the same Morris County property and a first lien on Mr. Pickens' Hilliard 75-b limited partnership interest; and the Lakeside National Bank of Rockwall, Texas, Lakeside Village Lots 2-A, 15-A and 15-B, shall be abandoned to such secured claimants at Closing in payment of their claims. According to the schedules filed by Mr. Pickens in the Richard Pickens Case, the value of each of these secured creditors' collateral is approximately equal to the amount of their respective claims. Although no deficiency is anticipated, each of these claimants shall have an unsecured claim in the Richard Pickens Case (Pickens Claim 10) for that portion of their claim which is not satisfied by the proceeds from the sale of their collateral.

*Pickens Class 5:* The secured claim of the Centennial Bank which is in the amount of approximately $405,000 and secured by a first lien on the Pickens Real Estate shall be paid in full by a cashier's check at Closing by Cressona from that portion of

the Real Estate Purchase Price which equals its claim; provided however, that the payment by Cressona to the Centennial Bank in full and final payment of its claim shall not exceed the sum of $405,000 less any reduction for reimbursement of prepaid insurance. The Plan cannot be confirmed unless the Centennial Bank either agrees to the payment of less than the full amount of its claim or the Plan is amended to provide for the payment in full of the Centennial Bank's claim.

*Pickens Class 7:* The secured claim of Vera Hume which is in the amount of approximately $50,000 and secured by a first lien on the Unimproved Property shall be paid by Cashiers Check at Closing by Cressona from that portion of the Unimproved Property Purchase Price which equals her claim; provided however, that the payment by Cressona to Vera Hume in full and final payment of her claim shall not exceed the sum of $50,000.

*Pickens Class 8:* The University National Bank of Denver, Colorado, a secured claimant holding a security interest in the lease covering the 5″ Press and Mr. Pickens' ownership interest in the 5″ Press, shall receive any disbursements attributable to any deferred lease payments due Mr. Pickens under the lease covering the 5″ Press, and the collateral securing its claim shall be abandoned at Closing to such Pickens Class 8 claimant in payment of its claim. The University National Bank shall also have an unsecured claim in the Richard Pickens Case (Pickens Class 10) for any portion of its claim which is not satisfied by the proceeds from the sale of its collateral and it may have an unsecured claim

in the Texas Extrusion Case (TE Class 8) for any damages arising from the rejection of the lease covering the 5″ Press. The unsecured claim of the University National Bank in the Texas Extrusion Case (TE Class 8) for damages arising from the rejection of the lease covering the 5″ Press should be approximately $86,400 less any reduction in recognition of the Bank's duty to mitigate those damages.

*Pickens Class 9:* After the disbursements to the TE Class 2 claimants have been made, all claims of the Padre Investment Company of Corpus Christi, Texas, which is in the amount of approximately $750 and secured by Camp Summer Unit 2 blocks 71 lt. 42, shall be paid in full from the Pickens Cash Fund. The secured claim of Padre Investment Company is being paid in full because the amount of its claim ($750) is according to the schedules in the Richard Pickens Case, very small in relation to the value of its security ($2,500).

*Unsecured Claim Against the Pickens*

*Pickens Class 10:* After the tax claims (Pickens Class 2 and Louise Pickens Class 2) and the claim of the Padre Investment Company (Pickens Class 9) have been paid each unsecured claimant in the Richard Pickens Case, except Lockheed, shall receive from the Pickens Cash Fund either (i) the full amount of their Pickens Class 10 claim, or if the sum remaining in the Pickens Cash Fund is not sufficient to pay all of the Pickens Class 10 claims in full then (ii) a pro rata share (i.e., the amount of each creditors' share being determined by dividing the amount of each such

Pickens Class 10 unsecured creditors allowed claim by the total amount of all such Pickens Class 10 allowed unsecured claims) of the sum remaining in the Pickens Cash Fund, as full and final payment and satisfaction of all such unsecured claims. The Proponents anticipate that approximately $257,000 will be available to pay approximately $975,000 in Pickens Class 10 claims (approximately $625,000 of which is one claim by the Small Business Administration covering loans to unrelated third parties guaranteed by Mr. Pickens).

The unencumbered assets listed on the schedules filed in the Richard Pickens Case include two patents held by Mr. Pickens and valued at $1,000 each and a note receivable from "Raskin" in the amount of $8,000. The non-exempt unencumbered assets in the Louise Pickens Case include 2 acres of unimproved land in Rockwall County, Texas of unknown value. These assets have not been included in calculating any recovery for the Pickens' unsecured creditors nor have they otherwise been dealt with under the Plan since they are valued by Mr. Pickens at the low amounts set forth above. Following confirmation the Pickens shall retain ownership of these assets.

*Louise Pickens Class 3:* Any and all unsecured claims in the Louise Pickens Case, approximately $522.68, shall be paid in full within ten days after Closing from the Louise Pickens Cash Fund. Lockheed is waiving its unsecured claim in the Louise Pickens Case.

*Pickens Class 11:* All unsecured claims of Lockheed in the Richard Pickens Case shall be subordinated to the other unsecured claims in that case and in the event any sum remains in the Pickens

Cash Fund after the payment of all Pickens Class 10 unsecured claims then such sum shall be transferred to Lockheed as payment of its Pickens Class 11 unsecured claim.

*Lawsuits and Releases*

In addition to the payment of the various claims described above, all the litigation and lawsuits between the Pickens, Texas Extrusion and Lockheed Corporation and LFC shall be dismissed with prejudice at or prior to Closing, and Lockheed Corporation, LFC, Texas Extrusion, PII and the Pickens shall each release the other and their respective subsidiaries, divisions and affiliates from any and all claims or causes of action whatsoever. It is a condition precedent to Closing that such releases be acceptable in form and substance to Lockheed Corporation and its counsel and that all the various lawsuits be dismissed with prejudice at or prior to Closing to the satisfaction of Lockheed Corporation and its counsel.

It is possible that if Texas Extrusion obtained a judgment against Lockheed in the Texas Extrusion Lawsuit, the unsecured creditors of Texas Extrusion could be paid in full. The amount of that judgment, however, would have to exceed the entire claim of Lockheed (approximately $7,983,065.83 plus daily accruals of interest) before any sums would be available for the administrative, tax and unsecureed claims in the Texas Extrusion Case. A description of the Pickens Lawsuit is attached hereto as Exhibit "A".

*Executory Contracts*

All executory contracts and leases in the Texas Extrusion Case, the PII Case, the Richard Pickens

Case and the Louise Pickens Case shall be deemed rejected upon confirmation of the Plan and any claims arising as a result of such rejection, except those claims which have been waived, shall be treated as unsecured claims. If however Cressona determines that one or more executory contracts and leases are important to the business of Texas Extrusion, then either (i) such executory contract and lease shall be assumed by Texas Extrusion and assigned to Cressona free and clear of all liens, claims and encumbrances relating to the period of time prior to the Closing and Cressona shall cure any defaults which are a precondition to assumption and assignment of the executory contract or (ii) Cressona shall be excused from any obligation to close under the Plan.

*Conditions Precedent to Confirmation or Closing*

In addition to the conditions to confirmation set out in Section 1129 of the Bankruptcy Code, the Plan may not be confirmed unless the Cash Fund, the Louise Pickens Cash Fund, and the other sums deposited with the Disbursing Agent for payment of various claims as described herein are sufficient to pay those claims. Lockheed, however, in its sole discretion may waive this condition. In addition to the conditions set forth in the Plan which must be satisfied prior to Closing and the conditions set forth in Exhibit D of the Plan, all the releases required under the Plan must be in form and substance acceptable to Lockheed and shall be delivered to Lockheed at or prior to the Closing and all litigation, suits, proceedings and claims in law or equity shall have been dismissed with prejudice prior to or at the Closing to the satisfaction of Lockheed and its counsel.

*Deferred Lease Payments*

The Pickens Real Estate, the 6″ Press and 30% of the 5″ Press are all assets in the Richard Pickens Case. Each of these assets are leased to Texas Extrusion. Since the filing of the bankruptcy petition by Texas Extrusion many of the lease payments due under these leases have been deferred by Texas Extrusion and remain unpaid. According to the Trustee, as of December 31, 1983 the deferred lease payments on the 6″ Press totalled $72,000 and the deferred lease payments on the 5″ Press totalled $64,790 and the deferred lease payments on the Pickens Real Estate totalled $99,200. According to the operating statements filed by Texas Extrusion and statements by Mr. Pickens made before the United States Trustee at Creditors' meetings, the Proponents believe certain portions of the deferred lease accurals on the Pickens Real Estate have been waived by Mr. Pickens and therefore the deferred lease payments on the Pickens Real Estate total $80,600. Mr. Pickens maintains that none of the deferred lease payments on the Pickens Real Estate were waived and if the Court so finds, the total deferred lease payments will be $99,200.

All of the deferred lease payments are classified as Post Petition Claims which are TE Class 2 claims under the Plan. The lease covering the 6″ Press is subject to a security interest held by Lockheed and the lease covering the 5″ Press is subject to a security interest held by the University National Bank of Denver, Colorado. Any allowed deferred lease payments on the 6″ Press shall be paid to Lockheed under the Plan and any allowed deferred lease payments under the 5″ Press shall be paid to the University National Bank under the Plan. The allowed deferred lease payments covering the Pickens Real Estate shall be placed in the Pickens Cash Fund.

*Management*

The Plan provides for the sale of most of the assets in each of these cases to Cressona. All of the assets and properties being sold to Cressona are necessary to or useful in the operation of the Texas Extrusion plant. It is not presently contemplated that any of the management personnel of Texas Extrusion shall be employed by Cressona following confirmation, but Cressona may, if it so desires, employ any person who was employed by Texas Extrusion prior to confirmation of the Plan.

*Alternatives to the Plan*

This Plan must be confirmed on or before March 22, 1984. If the Plan is not confirmed by that date the earnest money deposited with the Trustee by Cressona must be returned to Cressona and no parties shall have any further obligations under this Plan. In addition, the various lawsuits will continue until their final conclusion while the Debtors' assets slowly deteriorate in value. The Proponents believe that unless this Plan is confirmed and the assets and real estate sold to Cressona there will be little or no recovery for the creditors in any of these estates in the near future.

The Plan provides for the sale of most of the assets of Texas Extrusion and the real estate where those assets are located in one package to one buyer, Cressona. It is the Proponent's opinion that the sale of these assets and real estate together to one purchaser generates a higher purchase price and greater recovery for the creditors than the piecemeal sale of each asset and each parcel of real estate to different purchasers.

The Proponents and Cressona have engaged in extensive negotiations regarding the terms of this Plan. The

Proponents believe that this Plan will provide an opportunity for the creditors to receive a prompt recovery on their claims through the immediate sale of these assets to Cressona and the settlement of all litigation among the various parties and accordingly urges the creditors to vote for the Plan.

Dated: January 25, 1984

TEXAS EXTRUSION
CREDITORS' COMMITTEE

By: /s/ TIM GARRISON

Name: Tim Garrison

Title: Chairman Official Creditors' Committee

By: /s/ STEVE A. McCARTIN
Attorney for Official Creditors' Committee

LOCKHEED CORPORATION

By: /s/ R. H. HOPPS

Name: R. H. Hopps

Title: Vice President

Date: January 24, 1984

## EXHIBIT A

On or about November 15, 1983, the Pickens in their individual capacities filed a lawsuit against Lockheed Corporation (herein called "Lockheed"), Lockheed Finance Corporation (herein called "Lockheed Finance") and "Lockheed California Corporation". Lockheed was served with the lawsuit on December 8, 1983. Service was attempted on Lockheed California Company (herein called "CALAC") and Lockheed Finance on December 8, 1983.

A Motion to Dismiss for Improper Venue or, in the Alternative Motion to Transfer, and an original answer to the complaint were filed on behalf of Lockheed and CALAC. A Motion to Dismiss for Lack of Jurisdiction Over the Person and Insufficiency of Service of Process was filed on behalf of Lockheed Finance.

The factual allegations in the Pickens' complaint with certain minor exceptions, are copied word-for-word from the complaint filed by Texas Extrusion in the Texas Extrusion Lawsuit.

The Pickens' first claim for relief asserts they were induced by fraudulent misrepresentations of Lockheed, Lockheed Finance and CALAC to execute guarantees of and pledge security for loans provided to Texas Extrusion by Lockheed, Lockheed Finance and CALAC. They also claim the defendants failed to perform as represented. According to the Pickens, the defendants' fraudulent misrepresentations have resulted in the loss of collateral valued in excess of $500,000.

In their second claim for relief, the Pickens assert that Lockheed, Lockheed Finance and CALAC breached con-

tractual obligations under the original and the amended supply agreements. The Pickens assert that as a result of this breach Texas Extrusion was forced to file bankruptcy and they lost the value of their investment in Texas Extrusion, apparently $6,000,000 and were damaged in that amount. The Pickens also claim in connection with this count that as shareholders and "major contributors" of Texas Extrusion they are third party beneficiaries of the Amended Supply Contract.

The Pickens third claim for relief does not specify in any coherent fashion a specific cause of action. It appears to allege that Lockheed, CALAC and Lockheed Finance purposely refused to adhere to the terms of their contracts with Texas Extrusion and that such a course of action was willful and designed to drive Texas Extrusion out of business. The Pickens go on to claim the actions of Lockheed, CALAC and Lockheed Finance have financially ruined the Pickens and caused them to suffer emotional distress, change in economic condition, loss of standing in their community, loss of respectability in the business community, loss of abilities to develop and promote related business concerns and numerous intangible aspects of their daily lives. The Pickens claim that they are entitled to $3,000,000 as compensation for these injuries.

The fourth claim for relief seeks $6,000,000 in punitive damages because of the defendants' alleged fraudulent conduct.

Lockheed and CALAC have denied all of the allegations in the Pickens' complaint and intend to vigorously defend the lawsuit.

# APPENDIX G

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

### ARTICLE III, UNITED STATES CONSTITUTION

Section 1. *Judicial Power, Tenure and Compensation*

*Section 1.* The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

## 11 U.S.C. § 1125

§ 1125. *Postpetition disclosure and solicitation*

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan;

## 11 U.S.C. § 1125

§ 1125. *Postpetition disclosure and solicitation*

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan;

(As amended Pub.L. 98-353, Title III, § 509, July 10, 1984, 98 Stat. 385.)

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

## MISCELLANEOUS ORDER NUMBER 33

## LOCAL RULE OF THE NORTHERN DISTRICT OF TEXAS CONCERNING BANKRUPTCY CASES AND PROCEEDINGS

(Filed December 23, 1982)

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The court of bankruptcy constituted by § 404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d) (3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state

court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or

of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d) (2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d) (2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d) (3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as

appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (e)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. § 2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ____U.S.____, 102 S. Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

This rule supersedes the previous rule of this court entered and filed on the 4th day of October, 1982, which prior rule is here canceled.

This order has been executed by the Chief Judge of the United States District Court for the Northern District of Texas after consent to the entry of the order was obtained from each district judge and a majority of the bankruptcy judges of the district.

ENTERED this the 21st day of December, 1982.

By: /s/ HALBERT O. WOODWARD
Halbert O. Woodward
Chief Judge
Northern District of Texas

## 28 U.S.C. § 157

§ 157. *Procedures*

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding

is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolutions of a proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 340, and amended Pub.L. 99-554, Title I, §§ 143, 144(b), Oct. 27, 1986, 100 Stat. 3096.)

Rule 9003. *Prohibitions of Ex Parte Contacts*

Except as otherwise permitted by applicable law, any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987.)

Supreme Court, U.S.
FILED
OCT 7 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-417

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,

*Petitioners,*

v.

LOCKHEED CORPORATION,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# BRIEF IN OPPOSITION OF LOCKHEED CORPORATION

*Of Counsel:*

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October 7, 1988

## QUESTIONS PRESENTED

1. Does 11 U.S.C. § 1125 mandate that a disclosure statement provide a professional evaluation of the debtors' pending litigation, or is the determination of whether adequate information is provided about the pending litigation best left to the discretion of the fact finder based on case specific circumstances?

2. Under the "Interim Emergency Rule" governing bankruptcy cases in the Northern District of Texas, between December 21, 1982, and July 10, 1984, was it constitutional for a bankruptcy court, as an integral part of a plan of reorganization, to determine the settlement value of lawsuits brought by debtors involving state law contract claims and order their discontinuance for fair consideration?

3. Where a bankruptcy judge has announced in open court his approval of a plan of reorganization and preliminary supporting findings and conclusions, does the involvement of the prevailing party in the preparation of the final written findings and conclusions require that approval be set aside under Bankruptcy Rule 9003, DR 7-110(B) of the Code of Professional Responsibility, and Canon 3A(4) of the Code of Judicial Conduct, even though the evidence clearly supports the finally adopted findings and conclusions?

## LIST OF PARTIES

Those parties listed in the petition. Additionally, the following are affiliates of Lockheed Corporation (which has no parent company and no subsidiaries that are not wholly owned):

1. Airod Sdn Bhd
2. CADAM France S.A.R.L.
3. CADAM Services Company
4. Gulf Technology Systems Group
5. Letlock Saudi Arabia Co., Ltd.
6. Lockheed-Arabia
7. Lockheed Technical Services (Malaysia) S.B.
8. Pacific Aerospace Corporation Limited
9. Transnational Housing Company

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No. 88-417

IN THE
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*Petitioners,*

v.

LOCKHEED CORPORATION,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# BRIEF IN OPPOSITION OF LOCKHEED CORPORATION

Respondent, Lockheed Corporation, ("Lockheed"), respectfully prays that the Petition of Texas Extrusion Corporation, ("Texas Extrusion"), Pickens Industries, Inc. ("PII"), Richard W. Pickens and Louise R. Pickens, for a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 12, 1988, be denied.

## STATUTE INVOLVED

11 U.S.C. § 1129(a) provides in pertinent part:

(a) The court shall confirm a plan only if all the following requirements are met:

* * *

(7) With respect to each impaired class of claims or interests —

(A) each holder of a claim or interest of such class

(i) has accepted the plan; or

(ii) will receive or retain under the plan . . . not less than the amount that such holder would so receive or retain if the debtor were liquidated . . .

## COUNTERSTATEMENT OF THE CASE

### I.

### COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

This proceeding commenced almost seven years ago on March 24, 1982, when Texas Extrusion filed for protection from its creditors under Chapter 11 of the Bankruptcy Code.[1]

Progeny of the bankruptcy filing included two lawsuits brought against Lockheed and Lockheed Finance Company, the first instituted by Texas Extrusion on March 20, 1984, (the "Corporate Lawsuit") and the second brought by Richard and Louise Pickens, on November 15, 1983 (the "Individual Lawsuit"). Both lawsuits involved claims related to alleged

[1] PII which owns 100% of the stock of Texas Extrusion filed for bankruptcy at the same time. Richard and Louise Pickens, who together own 80% of the stock of PII filed for bankruptcy January 3, 1983, and November 21, 1983, respectively.

breaches of supply contracts between Texas Extrusion and Lockheed.

On October 28, 1983, a little over 18 months after the original bankruptcy filing, the bankruptcy court appointed a trustee to oversee the Texas Extrusion bankruptcy estate because the debtor in possession had accumulated post-petition liabilities of almost one million dollars, including unpaid federal withholding taxes in excess of two hundred thousand dollars.

On November 21, 1983, the trustee informed the Bankruptcy Court that Texas Extrusion could not be operated at a profit and would continue to incur substantial post-petition debt. Accordingly, the bankruptcy court ordered Texas Extrusion to discontinue all operations.

On November 15, 1983, in the vacuum created by the debtors' inability to properly operate the business of Texas Extrusion, the debtors' failure to propose any type of plan of reorganization, and with no indication any plan would be forthcoming from the debtors in the foreseeable future, Lockheed, as the largest creditor of Texas Extrusion, and the Official Creditors Committee, proposed a joint plan of reorganization (the "Joint Plan").[2]

The Joint Plan essentially provided for (1) Cressona Aluminum Company to purchase the principal assets of Texas Extrusion and those assets of the Pickens necessary to operate that business, (2) the payment of all administrative and post-petition liabilities, (3) the payment by Lockheed, of $475,000.00 to the unsecured creditors, and (4) the discontinuance of the Corporate and Individual Lawsuits. In effect, the settlement of the lawsuits was worth at least seven million dollars to the debtors, based on the fact Lockheed kept virtually none of the cash realized under the Joint Plan and the debtors were released of all obligations to Lockheed.

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[2] The plan was "joint" because while it was one document it separately addressed the four independent but related bankruptcy proceedings: (1) Texas Extrusion, (2) PII, (3) Richard Pickens and, (4) Louise Pickens.

On January 13, 1984, a lengthy hearing was held to consider numerous objections of the debtors to the disclosure statement for the Joint Plan. A disclosure statement incorporating changes required by that hearing was approved by the Bankruptcy Court on January 24, 1984.

On March 20, 1984, Judge John Ford of the United States Bankruptcy Court for the Northern District of Texas confirmed the Second Amended Joint Plan under Section 1129 of the bankruptcy code. The Joint Plan had to satisfy the requirements of that section because of the existence of impaired classes of creditors who were debtors in the related but independent bankruptcy proceedings who had not accepted the Joint Plan. To confirm the plan, Judge Ford had to conclude as a matter of federal bankruptcy law that those impaired creditors would not receive less under the Joint Plan than in liquidation.

On December 30, 1986, Judge Robert Porter, United States District Judge for the Northern District of Texas, issued a memorandum order, in response to appeals by the debtors of the order confirming the Second Amended Joint Plan, affirming all actions of the bankruptcy court in confirming that plan.

Debtors appealed to the United States Court of Appeals for the Fifth Circuit and the case was orally argued on November 3, 1987, before Circuit Judges, Jerre S. Williams and Patrick E. Higginbotham, and Barefoot Sanders, a District Judge, setting by designation.

In a lengthy opinion by Judge Williams, the Fifth Circuit upheld the actions of the Bankruptcy Court as affirmed by the District Court.

## II.

## STATEMENT OF FACTS

Much of what is said in petitioners' statement of the case represents a self-serving reading of disputed facts.

Respondent will agree that the underlying dispute between the parties centers on two supply agreements and a series of loans representing $5.5 million dollars of principal provided by Lockheed Finance Company for the benefit of Texas Extrusion.[3] Respondent disputes virtually every other "factual" statement by petitioners relating to the Texas Extrusion-Lockheed relationship. For example, petitioners suggest the second supply agreement between Texas Extrusion and Lockheed "purported" to release any claims petitioners believed they had under the first agreement. The following language from the second supply agreement does not "purport" to release claims, it accomplished that result:

> The parties hereto agree that this Agreement supersedes and replaces the agreement of February 22, 1979, as amended, including Amendment No. 1 dated April 4, 1979, between the parties and that the parties waive all rights or claims under said Agreement (except for uncompleted purchase orders) and each party releases the other from its obligations under said Agreement (except for performance and payment under uncompleted purchase orders).

Appendix at 77a

Similar creative license was taken by petitioners in describing the involvement of respondent's counsel in the finalization of the written findings of fact and conclusions of law supporting the previously announced decision of the bankruptcy judge to confirm the Joint Plan. Contrary to petitioners' assertions, there were not "repeated and extensive discussions" between counsel for Lockheed and the bankruptcy judge with respect to the

[3] At the time Texas Extrusion filed for bankruptcy that obligation with interest was in excess of seven million dollars, and had been assigned to Lockheed.

written findings and conclusions. In fact, "discussions" with the judge did not occur. Rather, the contact involved the submission of written findings of fact and conclusions of law to the law clerk for the judge followed by revisions to those conclusions and findings as suggested by the law clerk. In short, counsel for Lockheed served as nothing more than a scrivener for the judge, who in open court at the conclusion of the hearing had announced his decision and a preliminary basis for that decision before counsel prepared anything.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### I.

### PETITIONERS' CHALLENGE TO THE ADEQUACY OF THE DISCLOSURE STATEMENT SEEKS TO HAVE THIS COURT REVIEW ALLEGED ERRORS EITHER NOT PROPERLY PRESERVED OR INVOLVING A FACTUAL DETERMINATION WHICH IS CONSISTENT WITH STATUTORY REQUIREMENTS AND COURT DECISIONS.

Petitioners challenge the adequacy of the Disclosure Statement on three grounds: (1) the claimed absence of any language in the Disclosure Statement about the importance of the value of the Corporate and Individual Lawsuits to what creditors would receive under the plan, (2) the failure of the Disclosure Statement to discuss the possibility that Lockheed's claims could be equitably subordinated, and (3) the failure of the Disclosure Statement to place a specific dollar value on the Corporate and Individual Lawsuits.

Petitioners never raised the first two alleged deficiencies in the written objections they were required to provide to the bankruptcy court on the proposed disclosure statement. Having failed to preserve those alleged errors, petitioners cannot now be heard to complain.[4]

With respect to the third alleged deficiency, Petitioners are simply incorrect when they suggest that the Fifth Circuit was acting contrary to statutory requirements and existing precedent in approving a disclosure statement that did not place a specific dollar value on the Corporate or Individual Lawsuits. Although courts often consider litigation in which the debtor is involved as a material issue that should be revealed in the disclosure statement, *see, In re Route 202 Corp.*, 37 Bankr. 367, 375 (Bankr. E.D. Pa. 1984); *In re Fierman*, 21 Bankr. 314 (Bankr. W.D. Pa. 1982), they do not routinely require professional evaluation of that litigation. *In re The Stanley Hotel, Inc.*, 13 Bankr. 926, 935 (Bankr. D. Colo. 1981); *In re Werth*, 29 Bankr. 220, 223-224 (Bankr. D. Colo. 1983); *In re East Redley Corp.*, 16 Bankr. 429 (Bankr. E.D. Pa. 1982).[5]

The teaching of these cases is consistent with the general understanding of § 1125 of the bankruptcy code that the "adequate information" necessary for a creditor to make an informed choice about the acceptability of a plan of reorganization is a subjective determination made on a case by case basis.[6]

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[4] The Fifth Circuit explicitly recognized this point with respect to equitable subordination when it noted: "At no time prior to the approval of the Disclosure Statement or at anytime since then has any party brought an action against Lockheed for equitable subordination of its claims against debtors." Appendix at 28a. The other issue was never presented to the Fifth Circuit.

[5] The case cited by petitioners as contrary to this position is internally inconsistent, *see In re Malek*, 35 Bankr. 443, 444 (Bankr. E.D. Mich. 1983) ("*where possible* proponents *should* provide evaluation of probable success of litigation," vs. "the disclosure statement *must* include a professional evaluation of the probable success of . . . litigation.")

[6] In fact, § 1125(b) of the Bankruptcy Code specifically provides that "the court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets."

*In re Brandon Mill Farms, Ltd.*, 37 Bankr. 190, 192 (Bankr. N.D. Ga. 1984); *In re The Stanley Hotel, Inc.*, 13 Bankr. 926, 930 (Bankr. D. Colo 1981); *See also*, Legislative History at H.R. Rep. No. 595, 95th Cong., 1st Sess. 408, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6365.

In this matter, the disclosure statement clearly communicated that the value of the lawsuits to creditors was less than the payout proposed under the Joint Plan, otherwise, the Joint Plan would not have been proposed by the Official Creditors Committee. The disclosure statement also provided a six page description of the background to those lawsuits and succinct descriptions of the claims in both lawsuits. Appendix 119a-125a, 146a-148a. That background was buttressed by a letter from the Official Creditors Committee, which accompanied the disclosure statement, and commented that the major alternative to the Joint Plan would be to continue with the lawsuits. The letter noted that because of the expense and delay associated with the litigation and the uncertain results there was not a potential for a one hundred percent dividend. Further information concerning the Corporate Lawsuit was provided in a letter petitioners sent to all creditors, referred to by the bankruptcy court as a "hustle" letter, stating petitioners' view that the Corporate Lawsuit could result in a recovery of twenty-seven million dollars.

Petitioners failed to introduce evidence at the hearing on the disclosure statement why a "reasonable investor" would need further information about the lawsuits, how such additional information would have had any relevance in such a person's evaluation of the Joint Plan or why an informed choice could not be made in the absence of such information. In fact, the petitioners concede at page 13 of their petition that the disclosure statement did provide some guidance to the creditors about the lawsuit, although inconsistent with petitioners' evaluation of their cases. In short, the real complaint of petitioners is not that the disclosure statement failed to convey a value of

the lawsuits, but rather that it conveyed a view of the lawsuits different than their own.

Petitioners have only themselves to blame for the absence of competing or additional views in the disclosure statement concerning the value and importance of the lawsuits. In response to petitioners' concerns about the adequacy of the description of the litigation, the bankruptcy court offered petitioners an opportunity to include their views about the lawsuit in the disclosure statement. Petitioners refused this offer and should not now be heard to complain that insufficient information was provided to creditors. Clearly if they thought the lawsuits were worth more or that the Joint Plan should not be accepted because of a high probability the lawsuits would have generated more money for creditors then the Joint Plan, that information could have been included in the disclosure statement by them. In fact, petitioners provided just such information in their "hustle" letter. Moreover, the petitioners as the parties who instituted the lawsuits, were in the best position to estimate complexity, expense and likely duration, although a reasonable investor should have been able to reach conclusions on these factors based on the information in the disclosure statement.

Finally, petitioners who were all debtors, and intimately familiar with the details of the litigation, have never introduced any evidence suggesting that any creditor believed that it did not receive adequate information or was in some way misled by the disclosure statement's discussion of the importance or value of the litigation. If the disclosure statement was as inadequate as petitioners claim, it would seem reasonable that petitioners could have convinced some creditor to join in their challenge to the Joint Plan in the four and one-half years since it was confirmed.[7] No creditor, not also a "debtor", has ever challenged the disclosure statement.

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[7] The location of such a creditor should have been relatively easy, given petitioners' "hustle letter."

In short, this matter does not present a circumstance where *some* valuation of a key asset of the debtor was not provided. Rather the issue is whether, based on the information made available to the creditors in this case, they could make an informed choice about the Joint Plan and the Fifth Circuit concluded that standard had been satisfied. Given the numerous factors which impact what constitutes adequate information, a decision by the Court in this case will do little to provide guidance in other situations, especially where no true conflict of authorities has been shown to exist, and the Fifth Circuit followed the correct statutory standard.[8]

[8] The Court's decision in *TMT Trader Ferry v. Anderson,* 390 U.S. 414 (1968) is not to the contrary. That case involved the review of a district court's decision to approve a compromise under pre-1978 bankruptcy code standards. That determination has nothing to do with the adequacy of a disclosure statement under the current bankruptcy code. Certainly, petitioners are not suggesting a disclosure statement must include all of the information presented to a bankruptcy judge in deciding the value of a lawsuit.

## II.

## THE FIFTH CIRCUIT'S CONCLUSION THAT THE BANKRUPTCY COURT HAD JURISDICTION TO REQUIRE DISCONTINUANCE OF THE CORPORATE LAWSUIT AND THE INDIVIDUAL LAWSUIT, AS PART OF A PLAN OF REORGANIZATION, IS CONSISTENT WITH THE COURT'S DECISION IN *MARATHON*, OTHER ACTIONS BY THE COURT AND THE DECISIONS OF OTHER COURTS

Petitioners urge that their inability to prosecute the Corporate and Individual Lawsuits after the Joint Plan was confirmed, constituted a disposition of "private rights", which could only be accomplished by the district court.[9]

Petitioners are wrong as a matter of substantive law that the bankruptcy judge did not have jurisdiction to approve a Joint Plan which had the effect of preventing petitioners from continuing lawsuits involving state law contract claims. The Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) did not deprive bankruptcy judges of all ability to adjudicate state law claims. In particular, this Court recognized that Congress can constitutionally provide bankruptcy courts with original jurisdiction as a specialized tribunal to enforce statutory rights established by Congress to reshape debtor-creditor relations. *Id.* at 71, 83-83. *see also, Franklin Computer Corporation v. Apple Computer, Inc. (In re Franklin Computer Corp.)*, 60 Bankr. 795, 800 (Bankr. E.D. Pa. 1986). Here, the bankruptcy court functioned in exactly that capacity in valuing the lawsuit and approving the Joint Plan under the requirements of the federal bankruptcy code in order to allow petitioners to be discharged of their debts and productive use made of the physical assets of petitioners.

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[9] By invoking the jurisdiction of the bankruptcy court petitioners should have waived this claim. *see, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

Section 1129 of the bankruptcy code required the bankruptcy judge to assess the value of the lawsuits, as an asset of the estate, just as he assessed the value of the debtors' real property and other assets in determining if the Joint Plan should be approved. 11 U.S.C. § 1129(a)(7)(A)(ii). Once the bankruptcy judge had determined the value of those assets in liquidation (including the lawsuits) was not more than what creditors would realize under the Joint Plan (as required by section 1129(a)(7)(A)(ii)) approval of the Joint Plan was required by the federal bankruptcy code (assuming all other legal requirements were met). Thereafter all the assets covered by the Joint Plan were affected.

Petitioners have not complained in this case that the bankruptcy court did not have jurisdiction to force them to sell real and personal property as contemplated under the Joint Plan. Yet, the action of the bankruptcy court with respect to the lawsuits was no different in substance. By approving the Joint Plan as a matter of federal law, the bankruptcy court was in essence requiring petitioners to transfer the claims upon which they based their lawsuits to Lockheed in exchange for discharge of their debts. The fact that orders of dismissal were entered in those lawsuits goes to the form of that transaction and not its substance. In other words, if the bankruptcy court could not require the prosecution of the lawsuits be discontinued, as called for under the Joint Plan, it would also be prevented from disposing of any other assets because in all of those transactions "private rights" would be affected, at least in petitioners' view. Therefore, if the action of the bankruptcy court in approving the Joint Plan, which required discontinuance of two lawsuits, constitutes disposition of "private rights", within the meaning of *Marathon,* then under the Constitution there can never be a separate bankruptcy court confirming a plan of reorganization subject only to appellate review.

The Courts of Appeals have previously recognized such a result is not a proper reading of *Marathon,* and have consistently upheld the constitutionality of the Interim Emergency Rule, even in situations where adjudications of what would otherwise be viewed as "private rights" occurred, so long as such action was in the context of what is now referred to as a "core proceeding."[10] *see, Oklahoma Health Services Federal Credit Union v. Webb,* 726 F.2d 624 (10th Cir. 1984) (court had jurisdiction to order turnover of property) *Solomon B. Kaiser (In re Kaiser)* 722 F.2d 1574, 1581-82 (2d Cir. 1983) (court had jurisdiction to impose a constructive trust on property held in the name of debtor's wife); *Pizza of Hawaii, Inc. v. Shakey's Inc. (In re Pizza of Hawaii, Inc.),* 761 F.2d 1374 (9th Cir. 1985) (court had jurisdiction to approve plan of reorganization). Stated another way, these cases provide that so long as the action of the bankruptcy court affecting state law claims is a byproduct of entering an order on a traditional bankruptcy matter, jurisdiction could constitutionally be exercised by the bankruptcy judge. In this matter, the order attacked is confirmation of a plan of reorganization, certainly a traditional bankruptcy matter. That order was not a binding final judgment in the lawsuits, but required the debtors to execute releases that allowed the district court to enter the orders actually dismissing the actions. Approval of the Joint Plan was not based on state law but on an interpretation and application of section 1129 of the bankruptcy code. Therefore, while the bankruptcy judge considered state law in confirming the Joint Plan, his final action was based on the federal bankruptcy code. This Court has never suggested such an approach presents any constitutional difficulties, and on two occasions has refused to review the Interim Emergency Rule through applications for original writs. In re *International Harvester Co.* 460 U.S. 1079 (1983); *In re Doan,* 460 U.S. 1068 (1983).

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[10] The current jurisdictional statute for bankruptcy courts, 28 USC. § 157(b)(2)(L) specifically identifies confirmation of a plan as a "core proceeding."

## III.

## THE FIFTH CIRCUIT'S CONCLUSION THAT THE INVOLVEMENT OF RESPONDENT'S COUNSEL IN THE PREPARATION OF WRITTEN FINDINGS OF FACTS AND CONCLUSIONS OF LAW WAS NOT IMPROPER, IS CONSISTENT WITH PRIOR DECISIONS OF THE COURT AND WILL NOT HAVE THE EFFECT SUGGESTED BY PETITIONERS

Petitioners statement of the case suggests that counsel for respondent had repeated and extensive discussions with the bankruptcy judge in order to formulate that judge's position on confirmation of the plan. Nothing could be further from the truth. Prior to counsel for respondent's involvement in the preparation of written findings and conclusions, the bankruptcy judge had already announced in open court that he was confirming the plan and had read lengthy preliminary findings of fact and conclusions of law.[11]

Counsel for respondent served simply as a scrivener for the bankruptcy judge in the preparation of findings of fact and conclusions of law after a decision had been announced. Although critical of this practice, the Court has held that findings of fact and conclusions of law prepared entirely by the prevailing party (i.e. without any input from the court) will be upheld.[12] *Anderson v. Bessemer City,* 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656-57 (1964); *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 615 n. 13 (1974). The Fifth Circuit's decision in this case does nothing more than reiterate that conclusion.

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[11] A comparison of the preliminary oral findings and conclusions and the written findings and conclusions establishes they are not "radically different" in substance, although, not surprisingly, the form of the written findings and conclusions is different. Compare Appendix 53a-91a to 92a-118a.

[12] In this matter an extensive hearing was held on petitioners' objections to the written findings of fact and conclusions of law at which time petitioners aired all of their concerns before the findings and conclusions became final.

Petitioners' contention that the Fifth Circuit's opinion will authorize wholesale ex-parte contacts, is specious. A review of the Fifth Circuit's opinion establishes that the conduct the court was referring to as not violating the Texas Code of Professional Responsibility or the Texas Code of Judicial Conduct was the preparation of findings of fact and conclusions of law by the prevailing party. Therefore, the Fifth Circuit's opinion does not suggest that counsel is "free to engage in extensive discussions with the court" concerning a matter that is no longer pending. The Fifth Circuit's holding merely allows, but certainly does not require or encourage, the trial courts to permit the prevailing party to draft findings of fact and conclusions of law. That conclusion is consistent with a recent decision of the Court of Appeals for the Eleventh Circuit involving a similar circumstance, in which the court also refused to set aside the orders in question. *In re Colony Square Co.,* 819 F.2d 272 (11th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 1271 (1988).[13]

Even if the practice of submitting findings of fact and conclusions of law to a court on a matter that has already been decided did violate the Code of Professional Responsibility or the Code of Judicial Conduct, such a violation does not necessarily require the setting aside of those findings or the decision reached. Rather there must be some showing of harm. *In re Colony Square Co., supra,* at 276-277. In this case the decision and underlying findings of fact and conclusions of law have been determined to be supported by the evidence in two previous levels of appellate review preventing petitioners from demonstrating harm.

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[13] *Colony Square* presented a more problematic situation than the facts of this case in that the orders in *Colony Square* were based upon rulings communicated solely to the prevailing party as opposed to being announced in open court.

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: October 7, 1988

Respectfully submitted,

/s/ JAMES B. HARRIS

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NO. 88-417

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,
*Petitioners,*

v.

LOCKHEED CORPORATION,
*Respondent.*

## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a disclosure statement which fails to provide a complete and accurate description and evaluation of lawsuits which are the debtors' largest assets and defenses to the debtors' largest claims, and fails to state directly the primary choice presented to the creditors, satisfy the "adequate information" standard of 11 U.S.C. § 1125?

2. Does a bankruptcy court have the statutory and constitutional power to enter a final, dispositive order of dismissal, and make fact findings, concerning lawsuits involving breach of contract and fraud claims, as part of "proceedings in respect of confirmation of plans"?

3. Do Bankruptcy Rule 9003, DR 7-110(B) of the Code of Professional Responsibility, and Canon 3A(4) of the Code of Judicial Conduct, prohibit repeated and extended ex parte discussions between the bankruptcy judge and counsel for the winning party in a contested matter, where counsel and the judge prepare and discuss four amended versions of written findings of fact and conclusions of law?

## LIST OF PARTIES

The parties to the proceedings below were:

*Petitioners*

Texas Extrusion Corporation

Pickens Industries, Inc. (holder of 100% of stock of Texas Extrusion Corporation)

Richard W. Pickens and Louise R. Pickens, husband and wife (owners of 80% of stock of Pickens Industries, Inc.)

*Affiliates*

Texas B&P Machine Co., Inc.

Texas Extrusion Presses, Inc.

*Respondent*

Lockheed Corporation

*Affiliate*

Lockheed Finance Corp.

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The petitioners, Texas Extrusion Corporation, Pickens Industries, Inc., Richard W. Pickens and Louise R. Pickens, hereby file this reply brief to the brief in opposition of Lockheed Corporation, and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 12, 1988.

## I.

**Petitioners Have Not Waived Any Objections To The Adequacy Of The Disclosure Statement.**

Respondent Lockheed Corporation ("Lockheed") totally misstates the record when it asserts petitioners failed to preserve for appeal the first two deficiencies in the disclosure statement discussed in their petition. Brief in Opposition of Lockheed Corporation ("Lockheed Response") at 7. In fact, on February 28, 1984, petitioners filed their motion and a brief in support of motion to reject plan of reorganization, in which they specifically objected to the failure of the disclosure statement to pinpoint the Lockheed litigation as being the pivotal question to be decided by the creditors, as well as the failure of the disclosure statement to fully describe the litigation. It also specifically stated to the Bankruptcy Court that admissions had been made by the plan proponents that valuation of the Lockheed lawsuit was the major question to be decided by the court, and that the essence of the plan was a settlement of the Lockheed litigation. The brief then stated:

> That the proponents of the plan have made these admissions to the Court is simply astounding and remarkable—*FOR THE PROPONENTS TO ADMIT*

> *THAT THESE ARE THE KEY CONSIDERATIONS FOR APPROVAL OF THE PLAN CONSTITUTES AN ADMISSION BY THEM THAT THE DISCLOSURE STATEMENT IS TOTALLY INADEQUATE, SINCE NONE OF THESE STATEMENTS, NONE OF THIS ANALYSIS, AND NO BASIS FOR VALUATION OF THE LOCKHEED SUIT, ARE CONTAINED IN THE DISCLOSURE STATEMENT!*

Brief in Support of Motion to Reject Plan of Reorganization at 10-11 (Emphasis in original). The motion was argued at the Confirmation Hearing. Conf. Hear. at 268-270. Respondent's claim of waiver is frivolous.

Contrary to respondent's assertion that the Fifth Circuit made a finding of waiver regarding the argument equitable subordination, (Lockheed Response at 7, n. 4), the court made no such finding. Rather, the Fifth Circuit's comment about the absence of a pending action seeking equitable subordination was intended to bolster the court's opinion that it was "mere conjecture" to discuss equitable subordination in the disclosure statement. App. at 28a. However, the Fifth Circuit did *not* state that petitioners had waived their equitable subordination argument, by failing to preserve error or otherwise. Indeed, petitioners argued throughout the confirmation hearing that Lockheed's claim should not be given full value, but that equitable subordination should be applied. *See, e.g.*, Conf. Hear. at 205-206.

Finally, respondent's assertion that the failure of the disclosure statement to give adequate information about the Lockheed litigation or the true purpose of the plan was never presented to the Fifth Circuit, Lockheed Response at 7, n. 4, is a distortion of the record. In the

statement of issues presented for appeal to the Fifth Circuit, issue number two was:

> 2. Did the disclosure statement provide "adequate information" as required by 11 U.S.C. § 1125(d) sufficient to allow the creditors to make a reasonably informed decision concerning the dismissal of the Lockheed litigation and the valuation of the debtors' estates?

Petitioners' 1987 Fifth Circuit Brief at 1. The first section of the argument in such brief was entitled "The disclosure statement utterly failed to give adequate information about the Lockheed litigation or the true purpose of the plan." At page 22 of such brief, petitioners presented to the Fifth Circuit the *identical* all-capitals paragraph found at page 9 of their petition for certiorari to this Court, and supporting argument virtually identical to that presented here. Lockheed's misrepresentations to this Honorable Court are indefensible.

## II.

**Petitioners Have Not Waived Their Objections To The Constitutional Authority Of The Bankruptcy Court To Adjudicate Petitioners' State Law Claims.**

In reliance upon *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), respondent asserts that petitioners waived their argument that the bankruptcy court lacked constitutional power to adjudicate their claims. Lockheed Response at 11, n. 9. In *Schor*, the party complaining of the lack of an opportunity to proceed before an Article 3 court had expressly demanded that the opposing party proceed on its counterclaim in arbitration, rather than in district court, and never raised

any challenge to the forum until an unfavorable decision had been rendered. 106 S. Ct. at 3257.

The procedural history of this case was completely different. Although the claims of Texas Extrusion Corporation against Lockheed were originally filed as an adversary proceeding in bankruptcy court, the case was soon removed to the district court, on the motion of counsel for Texas Extrusion. Thereafter, the petitioners' individual claims against Lockheed were filed in district court. It was respondent Lockheed which moved to refer the corporate lawsuit and the individual suit back to the bankruptcy court, and petitioners opposed both motions. Petitioners moved to withdraw the reference of the corporate suit to bankruptcy court, and filed a "Notice of Nonconsent" *before* the conclusion of the confirmation hearing, stating that they did not consent to final, dispositive rulings by the bankruptcy court. Once again, respondent's argument of waiver is frivolous.

## III.

### The Disclosure Statement Did Not Contain "Adequate Information" Satisfying The Objective Standard Of The Statute.

The authorities relied upon by respondent do *not* support its assertion that application of the "adequate information" standard is a *subjective* determination. See Lockheed Response at 7-8. Instead, they simply observed, consistent with the statute, that determination of what is "adequate information" will vary from case to case. No authority cited by Lockheed, or of which petitioners are aware, other than the Fifth Circuit decision in this case, describes this as a "subjective" standard.

Rather, the statute defines "adequate information" as that which is sufficient to enable "a hypothetical reasonable investor" who is typical of his class to make "an informed judgment". This language, plus the fact that the Congress, in adopting this standard, was relying upon the same underlying premise as that found in the securities laws, establishes that Congress was intending to create an *objective* standard. *See* U.S. Code Congressional and Administrative News, 95th Congress, Second Session, 1978 at 6185-6186, 6187-6188.

The Lockheed argument that petitioners are to blame for the inadequacy of the valuation contained in the disclosure statement, see Lockheed Response at 9, is understandably not supported by citation to authority. Petitioners are aware of no area of law even outside the bankruptcy context, and certainly aware of no requirement anywhere within Section 1125, requiring the objecting party to cure the inadequacy of the document relied upon by his opponent.

The complaints by respondent that petitioners had failed to tender evidence supporting their objections to the disclosure statement seek to misplace the burden of proof. At no time in connection with the presentation of the disclosure statement did the proponents introduce any evidence supporting their contention that the disclosure statement contained "adequate information".

Of course, however, if evidence supporting petitioners' argument were required, petitioners have met their burden by demonstrating that the chairman of the creditors committee, one of the plan proponents, testified at the confirmation hearing that he did not know what the value of the lawsuit was, and that one could not determine the

value of the lawsuit by reading the disclosure statement. Conf. Hear. at 281-282.

## IV.

**The Bankruptcy Court Lacked Constitutional Authority To Make A Final, Binding Ruling Of Dismissal.**

Respondent's answer to petitioners' constitutional claims, and claims of conflict with this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) is actually a house of cards built upon the faulty premise that petitioners are concerned about disposition of "private rights", and since "private rights" are always affected by bankruptcy rulings, there is no problem. *See* Lockheed Response at 11, 12, 13. Of course, this circular argument misstates the language, and the substance, of petitioners' argument. Petitioners are contending that by virtue of *Marathon*, the bankruptcy court here lacked constitutional authority to make a final, binding order disposing of their state law claims for fraud and breach of contract in the Lockheed litigation.

Here, the bankruptcy court did far more than merely applying federal law and then ordering a transfer of property, as respondent would have this Court believe. See Lockheed Response at 12. Instead, the bankruptcy court made detailed findings of fact purporting to find numerous facts relevant to the state law contract claims. App. at 75a-78a. Such findings were clearly the underpinning for the bankruptcy judge's ruling based upon federal bankruptcy law, and led to his dismissal of the corporate lawsuit, and his order resulting in the dismissal

of the individual lawsuit. In light of petitioners' notice of nonconsent, it was error of a constitutional dimension for the bankruptcy court to purport to make binding determinations relevant to petitioners' state law contract claims.

Essentially, what respondent has done in its brief is to argue implicitly for application of the expansive rule discussed at pages 18-20 of the petition herein, without addressing the underlying problems inherent in this method of construction. As stated in the petition for writ of certiorari, the lower courts are desparately in need of guidance from this Court as to whether the expansive or restrictive interpretation of the jurisdictional statute is proper under *Marathon* and the decision of the Fifth Circuit in this case supporting the expansive interpretation must be overturned.

## V.

**This Court Should Reaffirm The Express Language Of Bankruptcy Rule 9003 Prohibiting Ex Parte Communications.**

The very tenor of respondent's argument concerning this point actually underscores the urgent necessity for this Court to exercise its supervisory power and reaffirm the clear language of Bankruptcy Rule 9003. The contention that counsel for Lockheed "served simply as a scrivener" and had no actual discussions with the bankruptcy judge is a calculated attempt to deceive the Court. The bankruptcy judge commented that "none of the attorneys had any discussion with me. They had them through my law clerk." Hearing on motion to amend findings of fact and conclusions of law at 43. One of

the counsel for respondent admitted that the judge discussed the changes with his law clerk, "and we had several conversations with the law clerk". *Id.* at 44. The judge explained that the procedure utilized was that the law clerk would make certain notes and talk with him about the changes, that he would tell her what he wanted done, and that the law clerk then went over the changes with counsel for respondent. *Id.* at 52. The admitted fact that the findings of fact went through four separate drafts with this type of communication whereby the judge and Lockheed's counsel communicated repeatedly through the law clerk certainly indicates that counsel for Lockheed was acting as more than a scrivener, but rather was applying its own creative input in an attempt to influence the final product without counsel for petitioners being advised of what was occurring.

Respondent has been unable to answer petitioners' contention that the Fifth Circuit decision in this case, if left to stand as valid precedent, would encourage wholesale ex parte communications between counsel and judges. The analysis of the Fifth Circuit, based upon the concept of whether or not the matter was still "pending" before the judge, App. at 44a, was not based upon the text of Rule 9003, which prohibits communications "concerning matters affecting a particular case or proceeding". The Fifth Circuit's addition of the "pending" concept invites application by aggressive advocates to other fact situations.

Of course, since the bankruptcy judge still retained plenary power to modify, or even overturn, his order confirming the plan, it is ludicrous to argue that the matter was no longer "pending" before him. It certainly

is untrue to state that the written fact findings were not "matters affecting a particular case or proceeding".

The "harm" which petitioners have suffered is that following a hotly contested hearing, counsel for respondent collaborated behind closed doors with the bankruptcy court to create written findings of fact and conclusions of law designed to make petitioners' appellate process even more difficult than it would have been otherwise.[1] This was done in express violation of Bankruptcy Rule 9003 and applicable provisions of the Code of Professional Responsibility and Code of Judicial Conduct. No further demonstration of "harm" should be required, if Bankruptcy Rule 9003 is to have any meaning.

## CONCLUSION

For the reasons stated above, as well as the reasons contained in the petition for writ of certiorari, the petition for certiorari should be granted. Upon final consideration, the written findings of fact should be stricken, and the order of the Bankruptcy Court either reversed, with the matter remanded to the Bankruptcy Court for further action, or, in the alternative, remanded to the District

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1. Examples of the material differences between the verbal and written findings of fact include the following: A verbal finding that respondent breached its contract with petitioner Texas Extrusion Corporation, App. at 101a, when no such finding appears anywhere in the written findings; a written finding that the debtor-in-possession was "unwilling or unable to submit a plan of reorganization", App. at 57a, when such finding was unsupported by the record and was not part of the court's verbal findings; a description in the written findings purporting to describe certain alleged guaranties of Richard and Louise Pickens as valid obligations, App. at 59a, when there was no competent evidence in the record supporting such a finding, nor was there such a verbal finding.

Court for a de novo determination of the facts consistent with 28 U.S.C. § 157, and this Court's ruling in *Marathon,* and petitioners should be awarded their costs and general relief.

Respectfully submitted,

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NO. 88-417

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,
*Petitioners,*

v.

LOCKHEED CORPORATION,
*Respondent.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does a disclosure statement which fails to provide a complete and accurate description and evaluation of lawsuits which are the debtors' largest assets and defenses to the debtors' largest claims, and fails to state directly the primary choice presented to the creditors, satisfy the "adequate information" standard of 11 U.S.C. § 1125?

2. Does a bankruptcy court have the statutory and constitutional power to enter a final, dispositive order of dismissal, and make fact findings, concerning lawsuits involving breach of contract and fraud claims, as part of "proceedings in respect of confirmation of plans"?

3. Do Bankruptcy Rule 9003, DR 7-110(B) of the Code of Professional Responsibility, and Canon 3A(4) of the Code of Judicial Conduct, prohibit repeated and extended ex parte discussions between the bankruptcy judge and counsel for the winning party in a contested matter, where counsel and the judge prepare and discuss four amended versions of written findings of fact and conclusions of law?

## LIST OF PARTIES

The parties to the proceedings below were:

*Petitioners*

Texas Extrusion Corporation

Pickens Industries, Inc. (holder of 100% of stock of Texas Extrusion Corporation)

Richard W. Pickens and Louise R. Pickens, husband and wife (owners of 80% of stock of Pickens Industries, Inc.)

*Affiliates*

Texas B&P Machine Co., Inc.

Texas Extrusion Presses, Inc.

*Respondent*

Lockheed Corporation

*Affiliate*

Lockheed Finance Corp.

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The petitioners, Texas Extrusion Corporation, Pickens Industries, Inc., Richard W. Pickens and Louise R. Pickens, hereby file this supplemental brief in support of their petition for certiorari and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 12, 1988.

## I.

**There Is A Conflict Among The Circuit Courts Regarding The Proper Interpretation Of 28 U.S.C. § 157.**

In the petition for certiorari, petitioners have explained the two methods of construction being utilized by the lower courts in interpreting 28 U.S.C. § 157, which is the successor statute to the "Emergency Rule".[1] One case following the restrictive analysis which was not cited in footnote 8 of the petition for certiorari is *In Re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986). In the *Castlerock* case, the court stated:

> . . . we are persuaded that a court should avoid characterizing a proceeding as "core" if to do so would raise constitutional problems. *See Mohawk*, 46 B.R. at 466; *Moric Electric*, 47 B.R. at 237-38. The apparent broad reading that can be given to § 157(b)(2) should be tempered by the *Marathon* decision. *American Energy*, 50 B.R. at 178.

781 F.2d at 162.

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1. *See* petition for a writ of certiorari, pages 17-21, and footnotes 7 and 8.

The *Castlerock* court holds specifically that state law contract claims not specifically falling within a category of core proceedings enumerated in the statute are non-core proceedings, even if they arguably fit within the literal wording of the two catch-all provisions contained in 28 U.S.C. § 157(b)(2)(A) and (O). 781 F.2d at 162. This holding is in direct conflict with the holding in *In Re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987), which is cited in the petition for writ of certiorari,[2] and with the Fifth Circuit decision in this case. *See* App. at 47a. Specifically, the court in *Arnold* held that a claim by a debtor-in-possession to collect a post-petition debt is a core proceeding because it falls within the literal wording of 28 U.S.C. § 157(b)(2)(A), "matters concerning the administration of the estate." 815 F.2d at 168. The court in *Castlerock* specifically rejected this reading of § 157(b)(2)(A), stating that

> State law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B-N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, § 157(b)(2)(A)(O). To hold otherwise would allow the bankruptcy court to enter final judgments that this court has held unconstitutional.

781 F.2d at 162.

Hence, the two conflicting views of 28 U.S.C. § 157 (*i.e.*, whether to construe the statute broadly to include all types of proceedings coming within the literal meaning of the statute, or more narrowly, using the analysis

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2. *See* petition for writ of certiorari, page 18, footnote 7.

in *Marathon* as a guideline) actually constitute a direct conflict among the circuits. The Fifth Circuit decision in this case has incorrectly joined the First Circuit, and a number of lower courts, in reading the jurisdictional statute broadly, in conflict with this Court's decision in *Marathon*, and the Ninth Circuit's decision in *Castlerock*. This conflict illustrates the confusion and difference of opinion among federal courts generally in interpreting this statute and the resulting need for guidance from this Court.

## CONCLUSION

For the reasons stated above, in the petition for writ of certiorari, and in the reply brief in support of petition for certiorari, the petition for certiorari should be granted. Upon final consideration, the written findings of fact should be stricken, and the order of the Bankruptcy Court either reversed, with the matter remanded to the Bankruptcy Court for further action, or, in the alternative, remanded to the District Court for a de novo determination of the facts consistent with 28 U.S.C. § 157, and this Court's ruling in *Marathon*, and petitioners should be awarded their costs and general relief.

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